DOCKET

No. 88-1353-CFY
Status: GRANTED

Title: United States, Petitioner
v.
Rene Martin Verdugo-Urquidez

Docketed:
February 13, 1989

Court: United States Court of Appeals
for the Ninth Circuit

Counsel for petitioner: Solicitor General

Counsel for respondent: Pancer,Michael, Hall,Patrick Q.

Entry	Date	Note		Proceedings and Orders
1	Jan 3 1989	G		Application (A88-529) to extend the time to file a petition for a writ of certiorari from January 13, 1989 to February 12, 1989, submitted to Justice O'Connor.
2	Jan 4 1989			Application (A88-529) granted by Justice O'Connor extending the time to file until February 12, 1989.
3	Feb 13 1989	G		Petition for writ of certiorari filed.
5	Mar 13 1989			Order extending time to file brief of respondent on the merits until March 27, 1989.
6	Mar 27 1989			Brief of respondent Rene Verdugo-Uriquidez in opposition filed.
7	Mar 29 1989			DISTRIBUTED. April 14, 1989
8	Apr 7 1989	X		Reply brief of petitioner United States filed.
9	Apr 17 1989			Petition GRANTED.
				**********
11	May 2 1989	G		Motion of the Acting Solicitor General to dispense with printing the joint appendix filed.
10	May 3 1989			Record filed.
			*	Certified copy of original record and proceedings, Volumes 1 through 19, 2 boxes, received.
12	May 15 1989			Motion of the Acting Solicitor General to dispense with printing the joint appendix GRANTED.
14	May 31 1989			Order extending time to file brief of petitioner on the merits until June 12, 1989.
15	Jun 7 1989	G		Motion of Criminal Justice Legal Foundation for leave to file a brief as amicus curiae filed.
16	Jun 12 1989			Brief of petitioner United States filed.
17	Jun 19 1989			Motion of Criminal Justice Legal Foundation for leave to file a brief as amicus curiae GRANTED.
19	Jul 8 1989			Order extending time to file brief of respondent on the merits until August 14, 1989.
21	Aug 13 1989	X		Brief of respondent Rene Martin Verdugo-Uriquidez filed.
20	Aug 14 1989			Brief amici curiae of ACLU, et al. filed.
22	Aug 28 1989			SET FOR ARGUMENT TUESDAY, NOVEMBER 7, 1989. (4TH CASE)
23	Sep 13 1989			CIRCULATED.
24	Sep 13 1989	X		Reply brief of petitioner United Stats filed.
25	Nov 7 1989			ARGUED.

PETITION FOR WRIT OF CERTIORARI

88-1353

No.

Supreme Court, U.S.
FILED
FEB 13 1989
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1988

UNITED STATES OF AMERICA, PETITIONER

v.

RENE MARTIN VERDUGO-URQUIDEZ

PETITION FOR A WRIT OF CERTIORARI TO TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

WILLIAM C. BRYSON
Acting Solicitor General
EDWARD S.G. DENNIS, JR.
Assistant Attorney General
LAWRENCE S. ROBBINS
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether evidence seized from the overseas residence of a foreign national must be suppressed under the Fourth Amendment because the United States law enforcement officers who conducted the seizure—in conjunction with, and with the approval of, foreign officials—did not have a search warrant.

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In the Supreme Court of the United States

OCTOBER TERM, 1988

No.

UNITED STATES OF AMERICA, PETITIONER

v.

RENE MARTIN VERDUGO-URQUIDEZ

PETITION FOR A WRIT OF CERTIORARI TO TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Acting Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-80a) is reported at 856 F.2d 1214. The opinion of the district court (App., *infra*, 81a-103a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 29, 1988. A petition for rehearing was denied on November 14, 1988 (App., *infra*, 104a). On January 4, 1989, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including February 12, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The district court in this case suppressed evidence seized by agents of the Drug Enforcement Administration (DEA) from the overseas residence of respondent, a Mexican national. The court of appeals affirmed that judgment by a divided vote, holding that the Fourth Amendment, and its Warrant Clause in particular, apply to overseas searches and seizures of property owned by foreign nationals. Because the seizure in this case was effected without a search warrant, the court of appeals upheld the suppression of evidence.

1. Respondent is a citizen of Mexico. On January 24, 1986, federal officers arrested respondent near Calexico, California, pursuant to an arrest warrant charging him with various narcotics offenses. Following respondent's arrest, Terry Bowen, a DEA agent assigned to the Calexico DEA office, decided to arrange for searches of respondent's residences in the Mexican cities of Mexicali and San Felipe. Agent Bowen believed that respondent's residences would contain cash proceeds and documents reflecting his participation in narcotics trafficking, as well as evidence of respondent's involvement in the kidnapping and assassination of a DEA agent (for which respondent has since been convicted in a separate prosecution). App., *infra,* 81a-82a, 91a.

Bowen first telephoned Walter White, Assistant Special Agent in Charge of the DEA office in Mexico City, and advised him of the proposed searches. Agent Bowen asked White to contact Florentino Ventura, the Director General of the Mexican Federal Judicial Police (MFJP), to secure authorization to conduct the searches and to obtain the assistance of MFJP officers. White twice attempted, without success, to contact Ortega Padilla, the Second Deputy Attorney General for the Republic of Mexico.

White then contacted Ventura, advised him of respondent's arrest, stated DEA's belief that respondent's residences would contain relevant evidence, and asked Ventura for permission to search the residences. Ventura authorized the searches and agreed to make MFJP officers available to assist in the operation. App., *infra*, 83a-84a.

While awaiting White's return call, Agent Bowen instructed the other DEA agents who would be conducting the searches that they were to seize all documentary evidence relevant to respondent's narcotics activities. The agents also understood that they were to seize evidence relating to the assassination of the DEA agent. After receiving the go-ahead from Agent White, Bowen and the other agents drove to Mexicali. There, they informed MFJP Comandante Enrique Salazar-Ramos that they had been authorized by Director General Ventura to conduct the searches. Salazar explained that he would have to verify that Ventura had indeed authorized the searches. After placing a telephone call, Salazar reported that "everything was fine," but he stated that he wanted to speak with the "delegado" before conducting the searches.[1] Salazar left the office, returning a few minutes later to announce that the searches could proceed. App., *infra,* 84a-85a.

Salazar and a group of MFJP officers accompanied the DEA agents to the Mexicali residence. Once there, Salazar and several of the MFJP officers entered the premises. Salazar then instructed the DEA agents to enter as well. The MFJP officers performed a security sweep of the

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[1] At the suppression hearing, a DEA agent, who is also a licensed attorney in Mexico, explained that a "delegado" is a Mexican attorney who functions as the local representative of the Mexican Attorney General, and that his duties include supervising the local MFJP officers. App., *infra,* 85a.

premises. Because it was already late in the day, Salazar decided to leave several MFJP officers at the Mexicali premises, directing them not to search it further at that time. He and several other MFJP officers then left with the DEA agents for the San Felipe residence. App., *infra,* 85a-86a.

Once in San Felipe, the agents located respondent's beach house residence. One of the MFJP officers entered the premises through a window and unlocked the front door. A group of MFJP and DEA officers then searched the premises for about two hours. The DEA agents seized certain documents, while the MFJP officers seized a number of firearms and vehicles. App., *infra,* 87a-88a.

The agents and officers then returned to the Mexicali residence, entered the premises, and conducted a search. The DEA agents again seized certain documents, while the MFJP officers seized weapons. Among the documents seized by the DEA agents was a tally sheet, which the government believes reflects quantities of marijuana smuggled by respondent into the United States.

At about 3:30 a.m., while Agent Bowen was searching a cabinet containing several briefcases of documents, Comandante Salazar decided that it was time to conclude the search. He directed Bowen to take the remaining documents and sort through them later. Bowen complied. After the search was completed, the DEA agents returned to the United States and prepared inventories describing the seized documents. App., *infra,* 6a, 88a-89a.

2. The district court suppressed the evidence seized from both premises (App., *infra,* 81a-103a). The court found at the outset (*id.* at 90a-91a) that the DEA agents had sufficiently participated in the searches to make those searches "a joint venture" between the American and Mexican agents (*id.* at 90a). The court acknowledged,

however, that it could find no precedent addressing the question "whether the Fourth Amendment applies to a foreign search of a foreign national conducted as a joint venture by United States and foreign officials" (*id.* at 92a). Nevertheless, the court found it "unlikely that the Fourth Amendment was not intended to protect an alien, already in the custody of the United States and charged in a criminal complaint, from searches of his foreign residences conducted by United States agents for the express purpose of obtaining evidence relevant to the pending prosecution" (*id.* at 93a). Under the Fourth Amendment, the court held (*id.* at 93a-100a), the agents were required to secure a warrant before conducting the searches. The court explained that the Mexican Constitution "seems to require * * * a warrant similar to that required by the Fourth Amendment" (*id.* at 93a-94a); and because the agents had not sought to obtain a Mexican warrant, the court stated that it was "disinclined to restrict application of the warrant clause of the Fourth Amendment" (*id.* at 94a). The court also held that although Fed. R. Crim. P. 41(a) "does not empower a federal magistrate or a state judge within the Southern District of California to issue a warrant authorizing searches of residences located in Mexico" (*id.* at 95a), a federal court has the "inherent power" (*id.* at 97a) to do so.[2] Because the agents had not secured a warrant from a United States district court, the court held

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[2] The district court acknowledged that the issuance of such a warrant might "infringe[] upon the sovereignty of the nation where the search is to occur." It explained, however, that "[t]he Fourth Amendment's general requirement of reasonableness * * * would certainly require, prior to the execution of any overseas warrant, that the search authorized by the warrant be approved by the appropriate foreign official." App., *infra,* 97a.

that the searches of respondent's residences were unconstitutional (*id.* at 98a).[3]

3. The government appealed from the district court's order suppressing the evidence obtained from respondent's Mexicali residence. The court of appeals affirmed by a divided vote (App., *infra,* 1a-80a). Quoting from the plurality opinion in *Reid* v. *Covert,* 354 U.S. 1, 5-6 (1957), the court observed at the outset that the United States " 'is entirely a creature of the Constitution' " and therefore " 'can only act in accordance with all the limitations imposed by the Constitution.' " From that premise, the court of appeals surmised that "a proposition of enormous vitality may be drawn: The Constitution imposes substantive constraints on the federal government, even when it operates abroad" (*id.* at 8a). Applying that principle, the court held that a nonresident alien may invoke the Fourth Amendment to challenge the reasonableness of a foreign search. It rejected the contention that because the Fourth Amendment is limited, by its terms, to "the people" of the United States, it does not embrace foreign nationals in connection with overseas searches and seizures (*id.* at 19a-20a). The court also found it "odd indeed" that aliens in this country would be entitled to a fair trial under the Sixth Amendment, and to due process under the Fifth Amendment, but would not be extended the protections of

[3] The district court also rejected (App., *infra,* 100a-101a) the government's contention that the good-faith exception to the exclusionary rule was applicable, under this Court's decision in *United States* v. *Leon,* 468 U.S. 897 (1984). Finally, the court found that the execution of the searches was unreasonable under the Fourth Amendment for these reasons: (1) because the searches were conducted primarily at night (App., *infra,* 101a-102a); (2) because the agents did not prepare contemporaneous inventories of the seized items (*id.* at 102a); and (3) because the searches were excessively general in scope (*ibid.*).

the Fourth Amendment against unreasonable searches and seizures of their property abroad (*id.* at 22a).[4]

Having concluded that respondent could challenge the Mexicali search under the Fourth Amendment, the court next held (App., *infra,* 32a-36a) that the search was constitutionally unreasonable for want of a warrant.[5] The court recognized that "a warrant issued by an American magistrate would be a dead letter in Mexico" and that "it would be an affront to a foreign country's sovereignty if the DEA presented an American warrant and suggested that it gave the American agents all the authority they needed to search a foreign residence" (*id.* at 35a). But the court nonetheless refused to "relieve the government" of the warrant requirement (*ibid.*). "To do so," the court stated, "would be to treat foreign searches differently from domestic searches just because they are foreign" (*ibid.*). The court saw no basis "to amputate from the body of th[e] [Fourth Amendment] protection the appendage that requires a detached magistrate's advance determination of probable cause and the issuance of a warrant," even with respect to a foreign search (*id.* at 35a-36a). And although an American warrant "would be of no legal validity in Mexico," the court concluded that it would still "have substantial constitutional value in this country" because it would "reflect the magistrate's determination that probable cause to search existed" and would "define the scope of the search" (*id.* at 36a). The court

[4] In reaching that result, the court of appeals found no need to "consider[] in [its] analysis" this Court's decisions in *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936), and *Johnson* v. *Eisentrager,* 339 U.S. 763 (1950). App., *infra,* 22a-23a n.3.

[5] The court of appeals also upheld the district court's finding that the DEA agents' participation in the Mexicali search was sufficient to make it a "joint venture" with the Mexican officials. App., *infra,* 23a-32a.

therefore affirmed the suppression of evidence seized from respondent's Mexicali home.[6]

Judge Wallace dissented (App., *infra,* 36a-80a). In his view, the Fourth Amendment does not apply to the search of foreign property belonging to a foreign national. Judge Wallace explained that the protections of the Fourth Amendment are limited, by their terms, to "the people"—a class, he stated, that does not include foreign nationals with respect to overseas searches (*id.* at 38a-39a). More generally, Judge Wallace found (*id.* at 39a-45a) that the Constitution itself is designed as a "social compact" between the government and " 'the people of the United States.' " The latter group, he explained, includes only "American citizens at home and abroad and aliens within our country's borders who are victims of actions taken *in the United States* by American officials" (*id.* at 46a (emphasis in the original)). By contrast, he noted, there is no support for the proposition that "the Bill of Rights protects foreign nationals residing abroad from *actions taken abroad* by the officials" (*ibid.* (emphasis in the original)). Finally, Judge Wallace found "very troubling" the majority's insistence on a warrant to conduct the searches (*id.* at 77a). In addition to other "constitutional and pragmatic" difficulties, he observed, "the majority's ruling ignores the practical realities that when our agents conduct searches abroad, they are at the mercy of foreign officials. The foreign officials are the ones who decide the scope and reasonableness of any proposed search, whether the search

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[6] The court of appeals also rejected the government's contention that a suppression remedy was unwarranted because the agents had relied in good faith on assurances by the Mexican officials that the search was lawful. In so holding, the court distinguished its prior decision in *United States* v. *Peterson,* 812 F.2d 486 (9th Cir. 1987). App., *infra,* 32a-33a.

will occur at all, and under what conditions it will be conducted. Even if, in a given case, these foreign officials defer considerably to the requests of our own agents, the fact remains that our agents are conducting the search at the pleasure and under the terms imposed by our foreign hosts." *Id.* at 79a.[7]

REASONS FOR GRANTING THE PETITION

In conducting the search of respondent's Mexicali residence, the DEA agents followed every requirement imposed by their Mexican hosts. They secured the advance authorization of responsible Mexican officials. They enlisted the active participation of the Mexican police. And they obeyed the orders of the Mexican comandante in executing the search and in securing the seized items. The court of appeals suppressed the seized evidence, however, because the agents did not take the additional precaution of obtaining an American search warrant—a warrant which no American official is empowered to issue, and which, as the court of appeals acknowledged, "would be a dead letter in Mexico" (App., *infra,* 35a-36a).

The court of appeals' decision is both unprecedented and unwise. Its application of the Fourth Amendment, and the Warrant Clause in particular, is at odds with this Court's decisions and with the decisions of other courts of appeals. The decision also threatens to impair law enforcement efforts overseas—efforts that cannot be effectively pursued if they must depend upon a magistrate's case-by-case authorization.

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[7] Judge Wallace also found no basis for suppressing the evidence either on the ground that the Mexicali search violated due process, or because suppression was appropriate under the district court's "inherent power" to ensure compliance with the Fourth Amendment. App., *infra,* 65a-79a.

1. a. The court of appeals broadly held that foreign nationals enjoy the full protections of the Fourth Amendment with respect to overseas searches and seizures. That sweeping conclusion cannot be squared with the decisions of this Court. To the contrary, this Court has explained that "[n]either the Constitution nor the laws passed in pursuance of it have any force in foreign territory unless in respect of our own citizens" (*United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936)). See also *United States* v. *Belmont*, 301 U.S. 324, 332 (1937) ("our Constitution, laws and policies have no extraterritorial operation, unless in respect of our own citizens").

This Court's decision in *Johnson* v. *Eisentrager*, 339 U.S. 763 (1950), illustrates the point in a related setting. The plaintiffs in that case, German nationals who had been convicted by an American military commission and imprisoned overseas for engaging in military activity against the United States, brought a habeas corpus action in a United States federal court, alleging that they had been denied various rights arising under the United States Constitution. The court of appeals held in plaintiffs' favor, reasoning, like the court of appeals in the present case, that "any person, including an enemy alien, deprived of his liberty anywhere under any purported authority of the United States is entitled to the writ if he can show that extension to his case of any constitutional rights or limitations would show his imprisonment illegal" (*id.* at 767). This Court reversed, expressly rejecting the proposition that constitutional rights extend to all "persons," regardless of their connection to this country. "Such extraterritorial application of organic law," the Court explained (*id.* at 784-785), "would have been so significant an innovation in the practice of governments that, if intended or apprehended, it could scarcely have failed to ex-

cite contemporary comment. Not one word can be cited. No decision of this Court supports such a view. * * * None of the learned commentators on our Constitution has even hinted at it. The practice of every modern government is opposed to it."

The text of the Fourth Amendment, moreover, supports the view that the right against unreasonable searches and seizures does not extend to all persons throughout the world. As Judge Wallace explained in dissent (App., *infra*, 38a-39a), the protections of the Fourth Amendment are limited, by their terms, to "the people," a term that strongly suggests that the rights extend only to those who may fairly be considered the people of the United States. Indeed, construing parallel language in the First Amendment, this Court has held that an alien who has not been permitted to enter this country cannot assert free speech or free press claims, since he is not "one of the people to whom these things are secured by our Constitution" (*United States ex rel. Turner* v. *Williams*, 194 U.S. 279, 292 (1904)).

The court of appeals rejected that analysis. It reasoned that the United States government " 'is entirely a creature of the Constitution' " and that "[t]he Constitution imposes substantive constraints on the federal government, even when it operates abroad" (App., *infra*, 8a). From that premise, the court concluded that the Constitution binds the government even when the government acts against foreign nationals. But that is exactly the argument which was accepted by the court of appeals in the *Johnson* case, and which this Court squarely rejected (see 339 U.S. at 781-782).

This Court's decision in *Reid* v. *Covert*, 354 U.S. 1 (1957), on which the court of appeals relied, does not hold to the contrary. The Court in *Reid* held that an *American*

living overseas was entitled to a civil jury trial, rather than a trial by court-martial, in a prosecution for the murder of her husband, a military officer. The plurality "reject[ed] the idea that when the United States acts against *citizens* abroad it can do so free of the Bill of Rights" (354 U.S. at 5 (emphasis added)). And it explained that "[w]hen the Government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land" (*id.* at 6). In short, *Reid* is limited by its terms to governmental action against American citizens. It does not stand for the "proposition of enormous vitality" derived by the court of appeals—that the Constitution binds the government wherever, and against whomever, it acts. To the contrary, the better reading of this Court's cases suggests that the protections of the Bill of Rights do not extend to aliens in connection with overseas transactions.

b. The question whether, and to what extent, the Fourth Amendment binds the government in its overseas activities directed against foreign nationals is one of recurring importance, and it remains unsettled among the courts of appeals. In contrast to the court below, the D.C. Circuit, relying on *Johnson* v. *Eisentrager, supra,* has broadly held that "non-resident aliens * * * plainly cannot appeal to the protection of the Constitution or laws of the United States." *Pauling* v. *McElroy*, 278 F.2d 252, 254 n.3, cert. denied, 364 U.S. 835 (1960). Although the court has since suggested in dicta that the *Pauling* case stands for a more limited proposition (see *Cardenas* v. *Smith*, 733 F.2d 909, 915-917 (1984)), a more recent D.C. Circuit decision has cited the *Pauling* case and indicated that the issue remains an open one. *Sanchez-Espinoza* v. *Reagan*,

770 F.2d 202, 208 (1985) (Scalia, J.). See also *Ramirez de Arellano* v. *Weinberger*, 745 F.2d 1500, 1516 (D.C. Cir. 1984), vacated on other grounds, 471 U.S. 1113 (1985) (not reaching the question whether a Honduran corporation has standing to sue for constitutional violations allegedly committed by the United States overseas); *id.* at 1556 (Scalia, J., dissenting) (Honduran corporation "has no rights under the United States Constitution with regard to activity taking place in Honduras and therefore cannot bring this lawsuit itself").

By contrast, the Second Circuit, like the court below, has held that non-resident aliens may challenge Fourth Amendment violations that occur overseas, "at least where the government seeks to exploit the fruits of its unlawful conduct in a criminal proceeding against the alien in the United States." *United States* v. *Toscanino*, 500 F.2d 267, 280 (1974). Applying that principle, the court held in *Toscanino* that a non-resident alien may raise a Fourth Amendment challenge to wiretaps conducted overseas by United States officials.

We submit that, in holding that the Fourth Amendment applies to overseas searches directed at aliens, the decisions of the courts of appeals in this case and in *Toscanino* are contrary to the decision of the D.C. Circuit in *Pauling* and the decision of this Court in *Johnson* v. *Eisentrager*. Review by this Court is warranted to resolve this fundamental and recurring question regarding the scope of the Fourth Amendment as it applies to searches occurring outside the borders of the United States.

2. Even if the searches in this case were governed by the Fourth Amendment, the court of appeals erred in applying the Warrant Clause to the agents' extraterritorial conduct. The court of appeals' holding with respect to the Warrant Clause ignores settled principles articulated in

this Court's cases, and is at odds with decisions of other courts of appeals.

a. The court of appeals surmised that to "relieve the government" of the warrant requirement "would be to treat foreign searches differently from domestic searches just because they are foreign" (App., *infra,* 35a). That premise, however, overlooks the fact that "what is reasonable depends on the context within which a search takes place" (*New Jersey* v. *T.L.O.*, 469 U.S. 325, 337 (1985)). In defining the contours of the right to be free from unreasonable searches and seizures, this Court has repeatedly said that " 'the specific content and incidents of this right must be shaped by the context in which it is asserted.' " *Wyman* v. *James,* 400 U.S. 309, 318 (1971) (quoting *Terry* v. *Ohio*, 392 U.S. 1, 9 (1968)). For three reasons, the fact that a search takes place overseas, and is directed against a foreign national, makes the warrant requirement inappropriate.

First, it is impracticable for agents engaged in overseas investigations to seek out an American magistrate whenever they wish to conduct a search or seizure abroad. As the Court explained most recently in *Griffin* v. *Wisconsin,* No. 86-5324 (June 26, 1987), slip op. 4 (citation omitted), exceptions from the warrant requirement have been permitted "when 'special needs, beyond the normal need for law enforcement, make the warrant * * * requirement impracticable.' " See *New Jersey* v. *T.L.O.*, 469 U.S. at 340 (quoting *Almeida-Sanchez* v. *United States,* 413 U.S. 266, 277 (1973) (Powell, J., concurring)). Where, for example, "the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search" (*Camara* v. *Municipal Court,* 387 U.S. 523, 533 (1967)),

the Court has held that a warrant is not required by the Fourth Amendment.[8]

Requiring agents overseas to secure a warrant in the United States before conducting a search or seizure "would interfere to an appreciable degree" (*Griffin,* slip op. 7) with their unusual responsibilities. Apart from the logistical difficulties, a warrant requirement, as Judge Wallace explained (App., *infra,* 79a), "ignores the practical realities that when our agents conduct searches abroad, they are at the mercy of foreign officials." The agents must comply with the demands of their hosts, and cannot be expected to follow the competing agenda set by an American warrant. In the present case, for example, Comandante Salazar directed Agent Bowen to seize all of the documents remaining in a certain cabinet and sort through them at a later time. An agent in that position should not be required to disobey such a request, simply because it may not comport with the particularities of a search warrant that a United States magistrate may have issued to the agent.

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[8] In *Griffin* v. *Wisconsin, supra,* the Court held that a probation officer need not obtain a warrant before conducting a search of a probationer's residence. The Court explained that a warrant requirement "would interfere to an appreciable degree with the probation system, setting up a magistrate rather than the probation officer as the judge of how close a supervision the probationer requires" (slip op. 7). Similarly, in *New Jersey* v. *T.L.O., supra,* holding that school officials did not need a warrant or probable cause to search a child suspected of an infraction of school disciplinary rules, the Court found that a warrant requirement "would unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools" (469 U.S. at 340). See also *O'Connor* v. *Ortega,* 480 U.S. 709, 722 (1987) (plurality opinion) ("requiring an employer to obtain a warrant whenever the employer wished to enter an employee's office, desk, or file cabinet for a work-related purpose would seriously disrupt the routine conduct of business and would be unduly burdensome").

Second, the fact that the search takes place abroad, and is directed against a foreign national, bears on whether, and to what extent, the individual's reasonable expectation of privacy has been invaded. "The permissibility of a particular law enforcement practice is judged by 'balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests.' " *United States* v. *Montoya de Hernandez*, 473 U.S. 531, 537 (1985) (quoting *United States* v. *Villamonte-Marquez*, 462 U.S. 579, 588 (1983)). See also *Delaware* v. *Prouse*, 440 U.S. 648, 654 (1979); *Camara* v. *Municipal Court*, 387 U.S. 523 (1967). Thus, not every invasion of privacy is prohibited by the Fourth Amendment, but only "arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals." *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 554 (1976).

Plainly, the nature and strength of an individual's reasonable expectation of privacy depend upon a complex of cultural and political factors that can vary widely among different countries. To require a warrant and probable cause for foreign searches simply because a warrant would be required in similar settings in this country would ignore those differences. Rather than being guided by Fourth Amendment doctrine as it has developed in this country, agents conducting investigations overseas should be bound, at most, by the more flexible Fourth Amendment requirement of reasonableness. And in applying that requirement, the courts should give great weight to the fact that officials in the host country have lent their cooperation or extended permission to United States agents to conduct the search or seizure in question, as the Mexican officials did in this case.

Finally, the fact that the search occurs overseas, and is conducted, as here, under the auspices and control of a

foreign government, renders a search warrant largely irrelevant. A search warrant is issued in part to empower an agent to conduct the search and in part to confine the scope of his discretion.[9] But a warrant issued for an overseas search—which will ultimately be conducted under the supervision or with the permission of foreign officials—serves neither function. It does not empower the agents to go forward; as the court of appeals itself recognized, "it would be an affront to a foreign country's sovereignty if the DEA presented an American warrant and suggested that it gave the American agents all the authority they needed to search a foreign residence" (App., *infra*, 35a). Nor does a warrant narrow the scope of the search; as Judge Wallace observed in dissent, "[t]he foreign officials are the ones who decide the scope and reasonableness of any proposed search, whether the search will occur at all, and under what conditions it will be conducted" (App., *infra*, 79a).

Because a warrant in this context is almost purely advisory, it is not surprising that the Federal Rules of Criminal Procedure do not even authorize courts to issue one. See *United States* v. *Williams*, 617 F.2d 1063, 1072 (5th Cir. 1980) (en banc) (footnote omitted). Fed. R. Crim. P. Rule 41(a) provides for the issuance of search warrants, but only from "a federal magistrate or a judge of a state court of record within the district wherein the property is located." Rule 41(a) plainly does not contemplate the issuance of warrants to search premises overseas.

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[9] The warrant requirement is intended to "make[] general searches * * * impossible and prevent[] the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant." *Marron* v. *United States*, 275 U.S. 192, 196 (1927). Accord *Andresen* v. *Maryland*, 427 U.S. 463, 480 (1976).

b. The court of appeals' insistence on a search warrant is also at odds with decisions of other circuits that have relaxed the warrant requirement in deference to the impracticalities presented by extraterritorial searches. In *United States* v. *Williams*, 617 F.2d 1063, for example, the Fifth Circuit held that the Coast Guard does not need a warrant to search the hold of a vessel in international waters. The court explained, in part, that "the practical problems that would be created by requiring the Coast Guard to obtain a warrant to conduct a search on the high seas * * * [would] likely eviscerate the Coast Guard's ability to combat drug smuggling" (*id.* at 1087-1088). The court also found that "there is substantial doubt that the federal district courts have the authority to issue * * * a warrant" to search a vessel on the high seas (*id.* at 1072 (footnote omitted)).

The First Circuit, in *United States* v. *Arra*, 630 F.2d 836 (1980), took a similar view, holding that the Coast Guard does not need a warrant to conduct an administrative document and safety inspection on the high seas. That conclusion, the court explained, "was consistent with the Supreme Court's excusal of administrative warrants in situations where 'the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search' " (*id.* at 842, quoting *Camara* v. *Municipal Court*, 387 U.S. at 533). Citing with apparent approval the Fifth Circuit's decision in *Williams*, the court also noted that "there exists no statute that provides authority for the issuance of warrants covering activities on the high seas" (630 F.2d at 842 n.7).

3. Finally, the court's application of the Fourth Amendment in this setting, and its rigid insistence on a warrant, present substantial obstacles to United States law enforcement efforts overseas. In recent years, crime, and

narcotics trafficking in particular, has become an increasingly international enterprise. See, *e.g.*, *United States* v. *Montoya de Hernandez*, 473 U.S. 531 (1985); *United States* v. *Villamonte-Marquez*, 462 U.S. 579 (1983). For that reason, the Drug Enforcement Administration is presently represented by 65 offices in 45 countries, and in 1988 alone DEA agents participated in overseas investigations that culminated in more than 1200 arrests of narcotics traffickers abroad. See Drug Enforcement Administration, *1990 Authorization and Budget Request to the U.S. Congress* 28 (1989). In that connection, moreover, American law enforcement agencies engage in numerous searches and seizures abroad, including the frequent use of wiretaps. See, *e.g.*, *United States* v. *Peterson*, 812 F.2d 486 (9th Cir. 1987); *United States* v. *Toscanino*, 500 F.2d 267 (2d Cir. 1974). Requiring agents overseas to secure a warrant in the United States—even where, as here, they are otherwise authorized by the officials of the host country to conduct the search—will inordinately impair the agents' ability to do their jobs.

The Fourth Amendment does not require law enforcement to absorb such costs. Neither the text of the Amendment, nor this Court's cases, extend the protection against unreasonable searches and seizures to foreign nationals, in respect to overseas transactions. And even if the Fourth Amendment applies to such searches, it should require only reasonableness, not the additional burden of obtaining and complying with a warrant issued by an American court.

CONCLUSION

The petition for a writ of certiorari should be granted.
Respectfully submitted.

WILLIAM C. BRYSON
Acting Solicitor General
EDWARD S.G. DENNIS, JR.
Assistant Attorney General
LAWRENCE S. ROBBINS
Assistant to the Solicitor General

FEBRUARY 1989

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 87-5061

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

RENÉ MARTIN VERDUGO-URQUIDEZ, DEFENDANT-APPELLEE

Decided Aug. 29, 1988

Before WALLACE, NORRIS and THOMPSON, Circuit Judges.

DAVID R. THOMPSON, Circuit Judge:

Rene Martin Verdugo-Urquidez is in custody awaiting trial on twenty counts of a forty-one-count indictment returned against him and thirty-eight other defendants. The indictment charges Verdugo-Urquidez with numerous narcotics and narcotics-related criminal violations, including conspiracy to import multi-ton quantities of marijuana into the United States, possession with intent to distribute multi-ton quantities of marijuana, and engaging in an on-going criminal enterprise. Verdugo-Urquidez's presence in the United States is the result of his arrest by Mexican police officers in Mexico and his delivery by them, across the border, into the waiting arms of the United States government. Verdugo-Urquidez challenged the district court's jurisdiction over him because of the manner in which the United States obtained his custody.

The district court rejected this contention, and Verdugo-Urquidez has not sought to appeal that ruling. The government appeals from the district court's order suppressing certain evidence obtained by United States Drug Enforcement Agency ("DEA") agents during their search of Verdugo-Urquidez's residence in Mexicali, Mexico.

The government raises two major arguments on appeal. First, the government contends that Verdugo-Uriquidez, a Mexican national, may not invoke the fourth amendment to the Constitution to challenge the DEA's actions in searching his Mexicali home. In the alternative, the government argues that even if the fourth amendment extends to Verdugo-Urquidez, the evidence seized nonetheless should have been admitted because the DEA agents reasonably relied on assurances of Mexican officials that the search was permissible under Mexican law, and the search was carried out in a reasonable manner. We have jurisdiction of this interlocutory appeal under 18 U.S.C. § 3731. We conclude that Verdugo-Urquidez is entitled to the protections of the fourth amendment, and that the district court properly suppressed the evidence obtained in the search of his Mexicali residence.

I

FACTS

Rene Martin Verdugo-Urquidez is reputed to be a drug smuggler and a killer. The DEA believes him to be one of the leaders of a large and violent organization based in Mexico, which smuggles large quantities of marijuana, cocaine and heroin into the United States. The DEA also believes Verdugo-Urquidez to have participated in the brutal and revolting kidnapping and torture-murder of DEA Special Agent Enrique Camarena Salazar. If these

allegations are proved true at trial, there is little doubt that Verdugo-Urquidez's conduct has placed him beyond the pale of civilized society. But in this country, a person is presumed innocent until proven guilty. We would not permit a jury to discard this fundamental precept of criminal law simply because the accused is charged with a serious crime. Likewise, we will not allow ourselves to be swayed by the DEA's suspicions, no matter how well founded, or by the government's repeated assertions, that Verdugo-Urquidez is in some way responsible for the death of Special Agent Camarena.

Since the late 1970s, the DEA has kept abreast of Verdugo-Urquidez's alleged activities as a drug smuggler. Based on an informant's tip that Verdugo-Urquidez planned to transport several tons of marijuana into the United States, the DEA filed a sealed complaint against him on August 3, 1985, charging him with various violations of the criminal laws of the United States. Based on this complaint, the United States District Court for the Southern District of California issued a warrant for his arrest. Thereafter, the DEA stepped up its investigation efforts and attempted to apprehend Verdugo-Urquidez on one of his frequent trips to the United States. Unable to locate him in this country, the DEA confirmed that Verdugo-Urquidez resided in Mexicali, Mexico, and contacted the United States Marshals Service to determine whether it would be feasible for Mexican authorities to apprehend Verdugo-Urquidez in Mexico and deliver him to the United States for trial.

In January 1986, the United States Marshals Service contacted Mexican law enforcement officers, who advised the Service that Verdugo-Urquidez could be arrested by Mexican officers in Mexico, provided there was an outstanding United States warrant for his arrest. The Mar-

shals showed the Mexican officers the warrant for Verdugo-Urquidez's arrest. The district court found that the following events then took place: On January 24, 1986, while driving his car in San Felipe, Baja California, Mexico, Verdugo-Urquidez was stopped by six Mexican police officers, at least one of whom showed him a badge. Verdugo-Urquidez was ordered from his car, arrested, handcuffed and placed in the back seat of the Mexican officers' unmarked car. With his hands still cuffed behind his back, the police forced Verdugo-Urquidez to lie face down on the car seat, with his head covered by his jacket. For most of the two hour ride to the Mexican-American border, Verdugo-Urquidez either lay on the seat covered with his jacket or lay there blindfolded. At no time did the Mexican police officers explain to Verdugo-Urquidez where they were going or why he had been arrested. When the Mexican officers arrived at the border, they removed Verdugo-Urquidez from their car and walked him to where United States Marshals waited.[1] The Marshals placed Verdugo-Urquidez under arrest and drove him to the United States Border Patrol station in Calexico, California. The Marshals then phoned the DEA's resident agent in Calexico, Terry Bowen, who testified he had been waiting for the call informing him of Verdugo-Urquidez's arrest. The DEA took custody of Verdugo-Urquidez and delivered him to the Metropolitan Correctional Center in

[1] Soon after the apprehension and delivery of Verdugo-Urquidez to the United States, the six Mexican police officers reported to their American counterparts that they were receiving death threats and feared for their safety and that of their families. The Mexican officers and their families subsequently were permitted to enter the United States, where they now live. A formal accusation has been filed by a prosecutor in the state of Baja California, Mexico, charging the six men with kidnapping.

San Diego, California, where he remains incarcerated pending trial.

After the DEA took custody of Verdugo-Urquidez, Agent Bowen discussed with his fellow officers the prospect of searching Verdugo-Urquidez's house in Mexico. Agent Bowen believed that a search of Verdugo-Urquidez's Mexicali residence would disclose cash proceeds from his smuggling operations, as well as documentary evidence of those transactions, including drug ledgers and phone books listing the names and addresses of his associates. Agent Bowen also hoped that the search would disclose information relevant to the Camarena investigation. Agent Bowen contacted Walter White, the Assistant Special Agent in charge of DEA operations in Mexico. Agent Bowen and Special Agent White discussed the arrest of Verdugo-Urquidez and the possibility of a DEA search of Verdugo-Urquidez's Mexicali residence. Special Agent White told Agent Bowen that he would make some phone calls and would see what could be done.

Thereafter, Agent Bowen received Special Agent White's approval to search the Mexicali residence.[2] On January 25, 1988, a team of four DEA agents drove to Mexicali, Mexico, where they met with the local commandante of the Mexican Federal Judicial Police (MFJP). With the help of several MFJP officers, the DEA searched Verdugo-Urquidez's Mexicali residence, as well as a house

[2] At no time did the DEA seek approval from the Justice Department or any United States Attorney's office for the intended search in Mexico. At no time did the DEA seek a search warrant from an American magistrate. Instead, the DEA sought the Mexican government's permission for the search of the Mexicali residence. We discuss the manner in which the DEA received this authorization to search, and details of the search itself, later in this opinion.

owned by Verdugo-Urquidez located in San Felipe, Baja California, Mexico. The search of the Mexicali residence disclosed a tally sheet, which purportedly reflects the quantities of marijuana smuggled into the United States by Verdugo-Urquidez.

Verdugo-Urquidez moved to suppress the evidence seized from his Mexicali residence. After a hearing, the court concluded that the fourth amendment to the Constitution applied to the DEA's search because it was a "joint venture" of the American and Mexican police officers. Furthermore, the court held that a foreign national is entitled to seek the suppression of evidence seized by American officers during a search conducted in a foreign country on the ground that the search violates the norms established by the fourth amendment. The district court then suppressed the evidence seized by the DEA because it concluded the search was invalid for two reasons: First, the DEA failed to seek a warrant authorizing the search. Second, even if a warrant was not required to authorize the search, the DEA's conduct in carrying out that search was not reasonable because the search was unconstitutionally general, it occurred after midnight and the DEA failed to leave a contemporaneous inventory of the evidence seized. The government appeals.

II

ANALYSIS

Applicability of Fourth Amendment

The threshold issue we confront is whether a foreign national whose foreign residence has been searched by United States law enforcement officers may challenge that search under the fourth amendment. Strangely enough, this question has not yet been answered by the Supreme

Court or definitively resolved by any circuit court of appeals. Indeed, until this case, we have been content simply to assume that the fourth amendment constrains the manner in which the federal government may pursue its extraterritorial law enforcement objectives. *See, e.g., United States v. Peterson,* 812 F.2d 486, 489 (9th Cir.1987).

1. *The Fourth Amendment Limits Government Action Abroad*

We begin our analysis with a proposition so reasonable and unremarkable that most people would find it bizarre indeed to learn that the rule has ever been otherwise:

> The United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution. When the Government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another country.

Reid v. Covert, 354 U.S. 1, 5-6, 77 S.Ct. 1222, 1225, 1 L.Ed.2d 1148 (1957) (plurality opinion) (footnotes omitted); *see also id.* at 56, 77 S.Ct. at 1251 (Frankfurter, J., concurring in the result) ("Governmental action abroad is performed under both the authority and the restrictions of the Constitution."); *cf. id.* at 66, 77 S.Ct. at 1256 (Harlan, J., concurring in the result) ("The powers of Congress . . . are constitutionally circumscribed. Under the Constitution Congress has only such powers as are expressly granted or those that are implied as reasonably necessary and proper to carry out the granted powers."). And yet, for a time, it was settled law that the Constitution applied "only to citizens and others *within* the United States, or who are brought there for trial for alleged offenses committed

elsewhere, and not to residents or temporary sojourners abroad." *In re Ross,* 140 U.S. 453, 464, 11 S.Ct. 897, 900, 35 L.Ed. 581 (1891) (emphasis added). This was said to be so because "[b]y the Constitution, a government is ordained and established 'for the United States of America,' and not for countries outside of their limits. . . . [Therefore, the] Constitution can have no operation in another country." *Id.* (citations omitted). The Supreme Court soon rejected this constrictive interpretation of the Constitution in favor of a more expansive vision of its reach. *See, e.g., Balzac v. Porto Rico,* 258 U.S. 298, 312-13, 42 S.Ct. 343, 348, 66 L.Ed. 627 (1922) ("The Constitution of the United States is in force in Porto Rico [sic] as it is wherever and whenever the sovereign power of that government is exerted."). In its *Reid* decision, the Court extended the Constitution's application to acts by the federal government in a foreign country. *Reid,* 354 U.S. at 7-9, 77 S.Ct. at 1225-26; *see also* Note, *The Extraterritorial Application of the Constitution—Unalienable Rights?,* 72 Va.L.Rev. 649, 659 (1986) ("[T]he *Reid* decision . . . represents the abandonment of the nineteenth century concept of strict territoriality."). In so construing the reach of the Constitution, a plurality of the Court rejected the notion that "only those constitutional rights which are 'fundamental' protect Americans abroad." *Reid,* 354 U.S. at 9, 77 S.Ct. at 1226 (plurality opinion) (footnote omitted).

From these cases, a proposition of enormous vitality may be drawn: The Constitution imposes substantive constraints on the federal government, even when it operates abroad. *See, e.g.,* Saltzburg, *The Reach of the Bill of Rights Beyond the Terra Firma of the United States,* 20 Va. J.Int'l L. 741, 745 (1980) ("Wherever and whenever the [federal government] acts it relies on the Constitution as the source of its powers. Whenever it acts, it must,

therefore, accept the limits on its power imposed by the . . . Constitution. . . . Thus, the Bill of Rights controls the activities of U.S. law enforcement officers wherever they occur."). In applying these substantive constitutional constraints, it is important to recall that

> [t]he concept that the Bill of Rights and other constitutional protections against arbitrary government are inoperative when they become inconvenient or when expediency dictates otherwise is a very dangerous doctrine and if allowed to flourish would destroy the benefit of a written Constitution and undermine the basis of our Government.

Reid, 354 U.S. at 14, 77 S.Ct. at 1229 (plurality opinion). Thus, in the context of this case, which involves the aggressive and laudable pursuit by the federal government of a legitimate law enforcement objective—the apprehension and prosecution of a suspected drug dealer of the worst sort—we also must take great pains to ensure that the Constitution does not become the first casualty in the "War on Drugs." *See* Wisotsky, *Crackdown: The Emerging "Drug Exception" to the Bill of Rights,* 38 Hastings L.J. 889 (1987). *See generally* Kamisar, *"Comparative Reprehensibility" and the Fourth Amendment Exclusionary Rule,* 86 Mich.L.Rev. 1 (1987).

2. *Aliens Brought to United States for Criminal Trials May Challenge Federal Government's Conduct under Fourth Amendment*

Having concluded that the Constitution limits the government's authority when it acts abroad, we must address the key question in this case: May a nonresident alien challenge the reasonableness of the federal government's actions under the fourth amendment? Under the facts of the present case, we hold that such a challenge may be raised.

The government's position in this case derives from a vision of the Constitution as a compact between the people of the United States and the federal government. This theory espouses the view that the Constitution should be regarded as a reciprocal arrangement between "The People" and the federal government. *See* U.S. Const. preamble ("WE THE PEOPLE of the United States . . . do ordain and establish this Constitution for the United States of America."). That is, "The People" cede to their government substantial authority over them in exchange for which the government agrees to abide by the limitations imposed on it by the Constitution. Verdugo-Urquidez is a nonresident alien. The compact theory tells us, then, that because Verdugo-Urquidez is not one of "The People" to whom the promise of the Constitution runs, he has no right to complain of governmental action in excess of that permitted by the Constitution.

This compact theory of the Constitution has deep roots in our nation's history. The interpretation of the Constitution as a contract also has found some expression in the courts. *See, e.g., Chisholm v. Georgia,* 2 U.S. (2 Dall.) 419, 471, 1 L.Ed. 440 (1793) (opinion of Jay, C.J.) ("[T]he constitution of the United States is likewise a compact made by the people of the United States, to govern themselves, as to general objects, in a certain manner."); *McCulloch v. Maryland,* 17 U.S. (4 Wheat.) 316, 404, 4 L.Ed. 579 (1819) (Marshall, C.J.) ("The government of the Union . . . is, emphatically and truly, a government of the people. In form, and in substance, it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit."); *League v. De Young,* 52 U.S. (11 How.) 185, 202, 13 L.Ed. 657 (1850) ("The Constitution of the United States was made by, and for the protection of, the people of the United States."); *In re Ross,* 140 U.S. 453, 464, 11 S.Ct. 897, 900, 35 L.Ed. 581 (1891) ("By the Constitution a government is ordained and established 'for the United States of America,' and not for countries outside of their limits. . . . The Constitution can have no operation in another country." (citation omitted)). The compact theory also has its adherents in the academic world. *See, e.g.,* Stephan, *Constitutional Limits on International Rendition of Criminal Suspects,* 20 Va.J.Int'l L. 777, 782 (1980) (observing that there is a "long held understanding that, in general, foreign nationals abroad are neither parties to nor beneficiaries of the agreement between the federal government and its people embodied in the Constitution").

Notwithstanding these sources, we are not persuaded that the compact theory is a legitimate mode for applying the Constitution in this case. This is so for three reasons we discuss hereafter. First, the historical evidence is equivocal and many sources may be cited in support of a broader interpretation of the Constitution. Second, the Supreme Court cases discussed above address the distinct problem of the relationship between the states and the federal government, and therefore provide little help in deciding how the federal government may act when it pursues extraterritorial objectives. Finally, decisions of the Supreme Court extending certain constitutional protections to aliens in other contexts show that the compact theory has been severely limited in its scope.

a. *The Historical Record*

As we have noted, there are historical sources that support the compact theory of the Constitution. These sources, however, reflect only part of the philosophical concerns reflected in the Constitution and the Bill of Rights. There are many historical records and commentaries explaining

that Americans of the Revolutionary Era held a deeply-felt belief in the "natural rights" of man. Indeed, one need look no further than the Declaration of Independence, with its references to "the laws of nature" and "inalienable rights." *See Declaration of Independence* (1776), *reprinted in* 1 B. Schwartz, *The Bill of Rights: A Documentary History* 251-52 (1971).

Further historical evidence of the "natural rights" theory abounds. For example, the various states' declarations of rights that served as the forerunners of our Bill of Rights again and again emphasize that the government is to respect the individual's rights: Thus, the preamble to the Vermont Declaration of Rights explains that "all government ought to be instituted and supported, for the security and protection of the community, as such, and to enable the individuals who compose it, to enjoy their natural rights, and the other blessings which the Author of existence has bestowed upon man." *Vermont Declaration of Rights* (1777), *reprinted in* 1 B. Schwartz, *supra*, at 319. And in enumerating the rights enjoyed by the inhabitants of Vermont, we find

> That the people have a right to hold themselves, their houses, papers and possessions free from search or seizure; and therefore warrants, without oaths or affirmations first made, affording a sufficient foundation for them, and whereby any officer or messenger may be commanded or required to search suspected places, or to seize any person or persons, his, her or their property, not particularly described, are contrary to that right, and ought not to be granted.

Id. c.1, art. XI, *reprinted in* 1 B. Schwartz, *supra*, at 323.

A number of other sources, from the nineteenth century to the present, support an interpretation of the Constitution that emphasizes an intent to prevent arbitrary encroachment by government on these "natural rights." *See, e.g.,* II J. Kent, *Commentaries on American Law* 1 (New York 1827) ("The absolute rights of individuals may be resolved into the right of personal security, the right of personal liberty, and the right to acquire and enjoy property. These rights have been justly considered, and frequently declared, by the people of this country, to be natural, inherent, and unalienable."). As Professor Schwartz also has explained:

> The dominant conception when the Framers wrote was that stated in Blackstone: "By the absolute *rights* of individuals, we mean those which are so in their primary and strictest sense; such as would belong to their persons merely in a state of nature, and which every man is entitled to enjoy, whether out of society or in it."

III B. Schwartz, *A Commentary on the Constitution of the United States: Rights of the Person (Volume 1)* 170 (1968) (emphasis in original; footnote omitted). *See generally* Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought,* 30 Stan.L.Rev. 843 (1978); Henkin, *Rights: Here and There*, 81 Colum.L.Rev. 1582, 1584-90 (1981); Note, *supra*, 72 Va.L.Rev. at 650 n. 8 (collecting sources). Thus, while the Framers may have used the phrase "compact" to explain the political theory by which the federal government was created, history also teaches that the Founders believed the Constitution would protect their inalienable rights.

Justice Story in his *Commentaries on the Constitution of the United States* cast considerable doubt on the validity of the compact theory. For instance, Justice Story found it peculiar to think of the Constitution as a contract because constitutions "are not only not founded upon the assent of all the people within the territorial jurisdiction,

but that assent is expressly excluded by . . . [restricting] ratification . . . to those, who are qualified voters." 1 J. Story, *Commentaries on the Constitution of the United States* § 327, at 296-97 (Boston 1833). Thus, the Constitution may not be treated as a contract because it purports to bind those who did not assent to it, were not permitted to assent to it and, as well, those born after its ratification. *Id.* § 328, at 297-98. Justice Story concluded that if the Constitution protects all "The People" of the United States, as it surely does, the protection it gives them cannot derive solely from a contract theory.

> It would, indeed, be an extraordinary use of language to consider a declaration of rights in a constitution, and especially of rights, which it proclaims to be "unalienable and indefeasible," to be a matter of *contract,* and resting on such a basis, rather than a solemn recognition and admission of those rights, arising from the law of nature, and the gift of Providence, and incapable of being transferred or surrendered.

Id. § 340, at 309 (emphasis in original).

b. *"Compact" Theory in the Supreme Court*

Earlier in this opinion, we cited four Supreme Court cases which explained that the Constitution is a compact between the people and the federal government. These cases, however, provide scant guidance in deciding whether the fourth amendment permits Verdugo-Urquidez to challenge an unreasonable search of his Mexicali residence by the federal government. In three of these cases, the Court considered some aspect of the relationship between the states and the federal government. *E.g., Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 1 L.Ed. 440 (1793) (considering whether a state may be sued in the Supreme Court by an individual citizen of another state);

McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 4 L.Ed. 579 (1819) (holding that a state may not tax an instrumentality of the federal government properly created by Congress in pursuit of an enumerated power); *League v. De Young*, 52 U.S. (11 How.) 185, 13 L.Ed. 657 (1850) (holding that a statute passed pursuant to the Constitution of the Republic of Texas could not be challenged as unconstitutional because, until Texas joined the Union, it was a sovereign power not bounded by the United States Constitution). Each case involved problems of federalism. The Supreme Court used the compact theory to explain that by ratifying the Constitution, the states surrendered some of their authority to the federal government. Thus, these cases cannot be considered authoritative on the question whether the Constitution applies to the extraterritorial acts of the federal government. Neither do they explain who may assert the protections of the fourth amendment.

Unlike the three cases previously mentioned, *In re Ross*, 140 U.S. 453, 11 S.Ct. 897, 35 L.Ed. 581 (1891), was one of a different line of cases in which the Court considered the extraterritorial application of the Constitution. The Court held in *Ross* that because the Constitution applies only within the United States, the trial of an American citizen in an American consular court neither required indictment by a grand jury nor a jury trial. *See id.* at 464, 11 S.Ct. at 900. But, as we explained *supra* in subpart II(A)(1), the *Ross* case is no longer good law in light of *Reid v. Covert,* 354 U.S. 1, 77 S.Ct. 1222, 1 L.Ed.2d 1148 (1957). *See Reid*, 354 U.S. at 5-6, 77 S.Ct. at 1224-25 (plurality opinion); *id.* at 56, 77 S.Ct. at 1251 (Frankfurter, J., concurring in the result). Moreover, the *Ross* decision actually supports Verdugo-Urquidez's argument that the fourth amendment applies to him.

> The guarantees [the Constitution] affords against accusation of capital or infamous crimes, except by indictment or presentment by grand jury, and for an impartial trial by a jury when thus accused, apply only to citizens and others within the United States, *or who are brought there for trial for alleged offenses committed elsewhere,* and not to residents or temporary sojourners abroad.

Ross, 140 U.S. at 464, 11 S.Ct. at 900 (emphasis added).

c. *Constitutional Protections for Aliens*

A number of cases have extended constitutional protections to *resident* aliens. *See, e.g., Yick Wo v. United States,* 118 U.S. 356, 369, 6 S.Ct. 1064, 1070, 30 L.Ed. 220 (1886) (extending fourteenth amendment to resident aliens because that amendment "is not confined to the protection of citizens"); *Bridges v. Wixon,* 326 U.S. 135, 161, 65 S.Ct. 1443, 1455, 89 L.Ed. 2103 (1945) (Murphy, J., concurring) (emphasizing that among the protections enjoyed by resident aliens are first, fifth and fourteenth amendments rights); *Kwang Hai Chew v. Colding,* 344 U.S. 590, 596, 601, 73 S.Ct. 472, 477, 479, 97 L.Ed. 576 (1953) (holding that a resident alien is a "person" within the meaning of the fifth amendment). True enough, these cases may be explained by the compact theory. That is, by becoming a *resident*, an alien "is bound to obey all the laws of the country, not immediately relating to citizenship, during [his or her] sojourn in it." *Carlisle v. United States,* 83 U.S. (16 Wall.) 147, 154, 21 L.Ed. 426 (1873); *see also Radich v. Hutchins,* 95 U.S. 210, 211, 24 L.Ed. 409 (1877) ("As a foreigner domiciled in the country, . . . [the alien] owed allegiance to the government of the country so long as he resided within its limits."). By accepting the obligations of allegiance to the United States, the alien receives in exchange some measure of constitutional protection.

> The alien, to whom the United States has been traditionally hospitable, has been accorded a generous and ascending scale of rights as he increases his identity with our society. Mere lawful presence in the country creates an implied assurance of safe conduct and gives him certain rights; they become more extensive and secure when he makes a preliminary declaration of intention to become a citizen, and they expand to those of full citizenship upon naturalization.

Johnson v. Eisentrager, 339 U.S. 763, 770, 70 S.Ct. 936, 939, 94 L.Ed. 1255 (1950); *see also Landon v. Plasencia,* 459 U.S. 21, 32, 103 S.Ct. 321, 329, 74 L.Ed.2d 21 (1982) (discussing *Johnson* with approval).

On the other hand, the Court has stated that an alien seeking admission to the United States enjoys no constitutional rights. *See, e.g., Landon,* 459 U.S. at 32, 103 S.Ct. at 329; *United States ex rel. Turner v. Williams,* 194 U.S. 279, 292, 24 S.Ct. 719, 723, 48 L.Ed. 979 (1904) ("[An alien] does not become one of the people to whom [first amendment rights] are secured by our Constitution by an attempt to enter forbidden by law. . . . [T]hose who are excluded cannot assert the rights in general obtaining in a land to which they do not belong as citizens o otherwise."). Just as it does in the resident alien cases, the compact theory adequately explains these "aliens seeking admission" decisions. The compact analysis fails, however, upon an examination of those cases in which constitu-

tional protections have been extended to illegal aliens who are within the United States.

The Supreme Court has extended significant constitutional protections to aliens within the United States, without distinguishing between those who are here legally or illegally, or between residents and visitors. *See, e.g., Yick Wo v. Hopkins,* 118 U.S. 356, 369, 6 S.Ct. 1064, 1070, 30 L.Ed. 220 (1886) ("The Fourteenth Amendment . . . is not confined to the protection of citizens. . . . [Its] provisions are universal in their application, to all persons within the territorial jurisdiction [of the United States]."); *In re Ross,* 140 U.S. 453, 464, 11 S.Ct. 897, 900, 35 L.Ed. 581 (1891) (holding that although fifth and sixth amendments do not apply to trials conducted in consular courts, their guarantees apply to "citizens and others within the United States, or who are brought there for trial"); *Wong Wing v. United States,* 163 U.S. 228, 238, 16 S.Ct. 977, 981, 41 L.Ed. 140 (1896) (holding that "all persons within the territory of the United States are entitled to the protection guaranteed by [the fifth and sixth] amendments"); *United States ex rel. Turner v. Williams,* 194 U.S. 279, 291, 24 S.Ct. 719, 722, 48 L.Ed. 979 (1904) (observing that fifth and sixth amendments protect aliens once they are in this country); *Mathews v. Diaz,* 426 U.S. 67, 77, 96 S.Ct. 1883, 1890, 48 L.Ed.2d 478 (1976) (explaining that all aliens within the jurisdiction of the United States enjoy the protections of the fifth and fourteenth amendments and may not be invidiously discriminated against by the federal government). In other cases, the Court has considered specifically the constitutional protections enjoyed by *illegal* aliens. *See, e.g., Plyler v. Doe,* 457 U.S. 202, 211, 102 S.Ct. 2382, 2391, 72 L.Ed.2d 786 (1982) (holding that under the Equal Protection Clause of the fourteenth amendment, states may not discriminate against illegal

aliens by withholding free public education; rejecting argument that illegal aliens are not within the jurisdiction of the states or the federal government and therefore are not entitled to equal protection rights). From these cases, we learn that aliens within the United States enjoy the benefits of the first, fifth, sixth and fourteenth amendments. The question we consider today is whether an alien, Verdugo-Urquidez, can claim benefits under the fourth amendment.

One argument against the application of the fourth amendment to Verdugo-Urquidez is that the language of this amendment is different from the language of the amendments that already have been found to protect aliens. For example, the first amendment broadly proscribes certain governmental conduct, while the fifth, sixth and fourteenth amendments prohibit certain acts, or provide certain rights, with respect to "persons." In a number of cases, the Court has remarked of these amendments that their "provisions are universal in their application." *See, e.g., Yick Wo,* 118 U.S. at 369, 6 S.Ct. at 1070 (fourteenth amendment); *Wong Wing,* 163 U.S. at 238, 16 S.Ct. at 981 (fifth and sixth amendments). The fourth amendment, in contrast, protects "the people" against unreasonable searches. It provides:

> The right of the people to be secure in their persons, houses, papers, and effects, and against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV.

We do not read the phrase "The right of the people to be secure" as restricting the application of the fourth amend-

ment to any special class of people. The language of the amendment does not so limit "people," and we will not insert qualifying language into the amendment to limit its application in such a fashion. In the present case, Verdugo-Urquidez, an alien in the custody of our government awaiting trial in our country, seeks to assert the protection of the fourth amendment. He is not in this country "illegally;" he's here because our government wants him here to face criminal charges. He is being prosecuted for alleged violations of United States law in a United States court. We can discern no conceivable reason why he should be denied the protection of the fourth amendment in connection with this prosecution.

We find support for the proposition that *illegal* aliens have fourth amendment rights in statements which appear in *Immigration & Naturalization Service v. Lopez-Mendoza*, 468 U.S. 1032, 104 S.Ct. 3479, 82 L.Ed.2d 778 (1984). There, the Court held that deportation hearings are not criminal proceedings, *id.* at 1038, 104 S.Ct. at 3483, and they are not appropriate proceedings in which to apply the exclusionary rule. *Id.* at 1041-50, 104 S.Ct. at 3484-89. Significantly, in the final part of the *Lopez-Mendoza* decision, a plurality of the Court stated:

> We do not condone any violations of the Fourth Amendment that may have occurred in the arrests of respondents Lopez-Mendoza and Sandoval Sanchez. . . . Our conclusions concerning the exclusionary rule's value might change, if there developed good reason to believe that Fourth Amendment violations by INS officers were widespread.

Id. at 1050, 104 S.Ct. at 3489. And in their dissenting opinions, four other justices expressed the view that illegal aliens have fourth amendment rights. *See id.* at 1051, 104 S.Ct. at 3490 (Brennan, J.) ("In this case, federal law enforcement officers arrested respondents . . . in violation of their Fourth Amendment rights."); *id.* at 1055, 104 S.Ct. at 3491 (White, J., joined in pertinent part by Stevens, J.) (opining that fourth amendment violations often go unchallenged by illegal aliens because "once the Government has improperly obtained illegal evidence against an illegal alien, he is removed from the country"); *id.* at 1060, 104 S.Ct. at 3494 (Marshall, J.) (acknowledging fourth amendment rights of illegal aliens). Indeed, in the *Lopez-Mendoza* case, the Solicitor General of the United States conceded that illegal aliens have fourth amendment rights:

> The determinative question, therefore, is not whether the protections of the Fourth Amendment extend to deportable aliens discovered in this country—*a proposition we do not contest*—but whether it is appropriate to permit illegal aliens to invoke the exclusionary rule in civil deportation proceedings in order to perpetuate their unlawful presence in the United States.

Brief for Petitioner at 10-11, *I.N.S. v. Lopez-Mendoza*, 468 U.S. 1032, 104 S.Ct. 3479, 82 L.Ed.2d 778 (1984) (No. 83-491) (emphasis added).

Given that in *Lopez-Mendoza* eight of nine Supreme Court justices, as well as the Solicitor General, took the position that illegal aliens possess fourth amendment rights, it is difficult to conclude that Verdugo-Urquidez lacks these same protections. The Court has told us that all aliens, "[e]ven one whose presence in this country is unlawful, *involuntary*, or transitory," enjoy fifth and fourteenth amendment rights, *see Mathews v. Diaz*, 426 U.S. 67, 77, 96 S.Ct. 1883, 1890, 48 L.Ed.2d 478 (1976) (emphasis added), as well as sixth amendment rights, *see Wong Wing*, 163 U.S. at 238, 16 S.Ct. at 981. Conse-

quently, it seems absurd to grant the protection of the fourth amendment to one whose presence in the country is voluntary although illegal, and yet deny it to Verdugo-Urquidez, whose presence in the United States, although legal, is plainly involuntary. Verdugo-Urquidez was arrested by the United States government when he was delivered into its custody by the Mexican police, and then, with criminal charges pending against him in this country, the federal government searched his residence in Mexico solely to obtain evidence to be used against him in his criminal prosecution. It would be odd indeed to acknowledge that Verdugo-Urquidez is entitled to due process under the fifth amendment, and to a fair trial under the sixth amendment, both of which rights he is accorded under established constitutional jurisprudence, and deny him the protection from unreasonable searches and seizures afforded under the fourth amendment.[3]

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[3] The dissent suggests that *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 57 S.Ct. 216, 81 L.Ed. 255 (1936), and *Johnson v. Eisentrager*, 339 U.S. 763, 70 S.Ct. 936, 94 L.Ed. 1255 (1950) should be considered in this analysis. *See* dissent at page 1240. We disagree.

The issues in *Curtiss-Wright* were whether Congress had improperly delegated its legislative powers to the president, whether a presidential proclamation had become effective, and if it had, whether persons charged with violations which occurred during the effective period of the proclamation could be prosecuted on an indictment brought after the president revoked the proclamation. *Curtiss-Wright* had nothing to do with the question whether the Constitution applies to aliens.

Johnson involved petitions for writs of habeas corpus filed in the United States District Court for the District of Columbia by enemy aliens imprisoned in Germany following their convictions in China by a military commission. The aliens were German nationals who had continued to engage in military activities against the United States, in China, after Germany's unconditional surrender but while the war against Japan continued. In rejecting the enemy aliens' petition for habeas corpus, the Court stated: "We hold that the Constitution does not confer a right of personal security or an immunity from military trial and punishment upon an alien enemy engaged in the hostile service of a government at war with the United States." *Johnson*, 339 U.S. at 785, 70 S.Ct. at 947. The Court also distinguished cases in which constitutional protections had been extended to persons other than American citizens who were in the United States:

> But, in extending constitutional protections beyond the citizenry, the Court has been at pains to point out that it was the alien's presence within its territorial jurisdiction that gave the Judiciary power to act. In the pioneer case of *Yick Wo v. Hopkins*, the Court said of the Fourteenth Amendment, "These provisions are universal in their application, *to all persons within the territorial jurisdiction*, without regard to any differences of race, of color, or of nationality; . . . ." 118 U.S.C. 356, 369 [6 S.Ct. 1064, 1070]. And in *The Japanese Immigrant Case*, the Court held its processes available to "an alien, who has entered the country, and has become subject in all respects to its jurisdiction, and a part of its population, although alleged to be illegally here." 189 U.S. 86, 101 [23 S.Ct. 611, 614-15, 47 L.Ed. 721 (1903)].

Johnson v. Eisentrager, 339 U.S. at 771, 70 S.Ct. at 940 (emphasis supplied by the Court in *Johnson*).

We hold that Verdugo-Urquidez may challenge the government's search of his Mexicali residence under the fourth amendment. We now consider whether this search was a search by the federal government.

3. *Determining When Government Acts Abroad*

In *Stonehill v. United States*, 405 F.2d 738, 743 (9th Cir.1968), *cert. denied*, 395 U.S. 960, 89 S.Ct. 2102, 23 L.Ed.2d 747 (1969), we observed that "[n]either the Fourth Amendment to the United States Constitution nor the exclusionary rule of evidence, designed to deter Federal officers from violating the Fourth Amendment, is applicable to the acts of foreign officials." *Id.* at 743. Because the fourth amendment does not itself require exclu-

sion of unlawfully obtained evidence, and because excluding reliable evidence will not force foreign officers to abide by the norms of the fourth amendment, the exclusionary rule has no application to searches conducted solely by a foreign government. *Id.* We explained, however, that "the Fourth Amendment could apply to raids by foreign officials . . . if Federal agents so substantially participated in the raids so as to convert them into joint ventures between the United States and foreign officials." *Id.*[4]

Since our decision in *Stonehill,* other circuit courts of appeals have addressed the "joint venture" doctrine, although not all circuits have phrased the analysis in the way we have. *See, e.g., United States v. Rosenthal,* 793 F.2d 1214, 1231 (11th Cir.), *modified,* 801 F.2d 378 (1986), *cert. denied,* __ U.S. __, 107 S.Ct. 1377, 94 L.Ed.2d 692 (1987); *United States v. Paternina-Vergara,* 749 F.2d 993, 998 (2d Cir.1984), *cert. denied,* 469 U.S. 1217, 105 S.Ct. 1197, 84 L.Ed.2d 342 (1985); *United*

[4] There is an independent corollary to the rule that the Constitution and the exclusionary rule do not apply to searches conducted by foreign police in their own country. In "a case where federal officials . . . induce[ ] foreign police to engage in conduct that shock[s] the conscience," the district court may in the exercise of its supervisory power exclude the evidence. *United States v. Maher,* 645 F.2d 780, 783 (9th Cir.1981) (*quoting United States v. Birdsell,* 346 F.2d 775, 782 n. 10 (5th Cir.), *cert. denied,* 382 U.S. 963, 86 S.Ct. 449, 15 L.Ed.2d 366 (1965)). Verdugo-Urquidez does not raise this ground to support suppression of the challenged evidence. Accordingly, we do not examine cases such as *United States v. Toscanino,* 500 F.2d 267 (2d Cir.1974), which purported to use the "joint venture" analysis to exclude evidence, but which a later panel of the Second Circuit tells us is best understood as a case involving the suppression of evidence obtained by the federal government in conjunction with the brutal torture of a foreign national by foreign police. *See United States ex rel. Lujan v. Gengler,* 510 F.2d 62, 65-66 (2d Cir.), *cert. denied,* 421 U.S. 1001, 95 S.Ct. 2400, 44 L.Ed.2d 668 (1975).

States v. Hawkins, 661 F.2d 436, 455-56 (5th Cir. Unit B Nov. 1981); *United States v. Heller,* 625 F.2d 594 599-600 (5th Cir.1980); *United States v. Marzano,* 537 F.2d 257, 269-71 (7th Cir.1976), *cert. denied,* 429 U.S. 1038, 97 S.Ct. 734, 50 L.Ed.2d 749 (1977). The "joint venture" analysis also has been applied repeatedly by this court. *See, e.g., United States v. Peterson,* 812 F.2d 486, 490 (9th Cir.1987); *United States v. Benedict,* 647 F.2d 928, 930-31 (9th Cir.), *cert. denied,* 454 U.S. 1087, 102 S.Ct. 648, 70 L.Ed.2d 624 (1981); *United States v. Maher,* 645 F.2d 780, 782-83 (9th Cir.1981); *United States v. Rose,* 570 F.2d 1358, 1361-62 (9th Cir.1978). Notwithstanding the extensive discussion of the doctrine in the courts, however, it remains as true now as it was in 1976 when the Fifth Circuit observed:

> The few courts that have considered the question of how much American participation in a foreign search and seizure is required to mandate application of the exclusionary rule have not been unanimous in their choice of the precise test to be applied—though they have as a statistical matter been virtually unanimous in rejecting claims of undue participation.

United States v. Morrow, 537 F.2d 120, 140 (5th Cir.1976). Nevertheless, when we consider the facts of this case against the backdrop of prior cases, it is abundantly clear that the DEA's involvement in this search was so great that no court could logically conclude anything other than that the search was an American operation from start to finish.

a. *The Mexicali Search*

Based on DEA Agent Terry Bowen's own investigation and surveillance in Mexico, and relying on reports by other DEA agents or confidential informants, Agent

Bowen concluded that Verdugo-Urquidez's Mexicali house was his principal residence in Mexico. Agent Bowen also concluded from reports of confidential informants that Verdugo-Urquidez owned another house in San Felipe, Baja California, Mexico. Agent Bowen believed that a search of these houses would disclose cash proceeds of Verdugo-Urquidez's alleged narcotics transactions, as well as relevant documentary evidence, including drug ledgers and address books identifying Verdugo-Urquidez's associates. Agent Bowen also hoped that the searches would disclose information pertaining to the Camarena murder investigation. The district court found that Agent Bowen's "express objective in conducting the . . . searches was to obtain evidence for use against Verdugo in the pending United States prosecution." [CR 384, at 2-3]. The court also found that while Agent Bowen had participated in other searches in Mexico, in almost none of those cases had seized evidence subsequently been introduced against a defendant in a criminal trial. "Despite his inexperience with the use of such foreign seized evidence in a United States prosecution, Bowen did not discuss the searches with anyone prior to making his decisions. Bowen alone made the decision to conduct the searches." [CR 384, at 3].

On January 24, 1986, Agent Bowen telephoned Walter White, the Assistant Special Agent in charge of DEA operations in Mexico. Agent Bowen and Special Agent White discussed the arrest of Verdugo-Urquidez and Agent Bowen's interest in searching the Mexicali and San Felipe residences. Agent Bowen asked Special Agent White to contact Florentino Venture, the Director General of the Mexican Federal Judicial Police (MFJP), and ask him to authorize the search and instruct the local MFJP commandante to cooperate with the DEA. Special Agent White did not ask Agent Bowen whether the approval of

the Justice Department had been sought or obtained, although he agreed to contact Director Ventura.

After their conversation, Special Agent White unsuccessfully attempted to reach Ortega Padilla, the Second Deputy Attorney General for the Republic of Mexico, and Director Ventura. The next morning, Special Agent White reached Director Ventura and explained to him that DEA agents in Calexico believed Verdugo-Urquidez's Mexican residences contained evidence relevant to a pending criminal prosecution and wanted permission to search. Director Ventura agreed to authorize the search. He told Special Agent White that Agent Bowen should inform the local MFJP commandante in Mexicali that permission for the searches had been received and that the MFJP officers were to cooperate.

At approximately 1:00 p.m. on January 25, 1986, Special Agent White called Agent Bowen and gave him the go-ahead for the search. Agent Bowen already had assembled a team of three other DEA officers, all of whom knew that Verdugo-Urquidez had been arrested and that he also was a suspect in the Camarena case. Agent Bowen instructed his officers that they were to seize any documentary evidence relevant to Verdugo-Urquidez's alleged narcotics activities. After receiving Special Agent White's phone call, the four DEA officers drove to the MFJP office in Mexicali, Mexico. Agent Bowen then met with the local MFJP commandante, Enrique Salazar-Ramos, and informed him of Verdugo-Urquidez's arrest and that Director Ventura had authorized the searches "and stated that the local MFJP officers were to assist the DEA agents in conducting the searches." [CR 384, at 5]. Commandante Salazar verified Agent Bowen's statements by placing a phone call, apparently to one of the commandante's superior officers. After assuring the DEA agents that "everything was fine," Commandante Salazar said that he

wanted to check with the "delegado," the official representative of the Mexican Attorney General in Mexicali. Shortly thereafter, the commandante returned and agreed to help in the search. Before leaving the MFJP office, Commandante Salazar told the DEA agents that they would be permitted to take back to the United States any documentary items they found.

With a team of between ten and fifteen MFJP officers, the DEA agents and Commandante Salazar drove to the Mexicali residence, arriving there after dark. Commandante Salazar stationed some of his officers around the perimeter of the house and, while the DEA agents waited in the street, an entry team composed entirely of MFJP officers entered the house. While the MFJP officers conducted a security sweep, the DEA agents entered the house but they did not search the house at this time.

Because it was already late and because San Felipe was two hours away, Commandante Salazar and Agent Bowen decided to drive there and search the San Felipe house first. The commandante left behind a force of four or five officers who were instructed to secure the Mexicali residence, but who were told not to search it until he and the DEA agents returned. The DEA and the remaining MFJP officers then drove to San Felipe, where they searched Verdugo-Urquidez's San Felipe residence. The district court found that most of the MFJP officers stood a perimeter watch while the DEA agents searched the house over a two-hour period. The court found that "the DEA agents actively participated in the search itself, both in terms of actually looking for relevant documentary items and identifying as relevant those documentary items discovered by MFJP officers." [CR 384, at 7]. During this search, the items were segregated depending upon which agency seized them. At the conclusion of the search, which occurred some time before midnight, seized items were

turned over to the DEA agents. The MFJP officers seized several weapons, as well as a 1984 Grand Marquis and some other motor vehicles. Neither the MFJP nor the DEA left a receipt or inventory identifying the seized items.

The commandante and the DEA then returned to the Mexicali residence, arriving about two hours after leaving San Felipe. The district court found that Commandante Salazar, at least two or three MFJP officers, and three of the four DEA agents conducted a room-by-room search of the Mexicali house. The DEA agents seized evidence thought relevant, while the MFJP officers brought documents they found to Agent Bowen, who decided whether the DEA wanted them. Again, the seized items were segregated based on which agency found them, although all the seized documents were placed in the DEA agents' car. And, as in the San Felipe search, the MFJP kept all weapons they found.

At around 3:00 or 4:00 a.m., Commandante Salazar grew tired of the search, which at that time was being conducted by Agent Bowen, who was sorting through several files found in a cabinet kept in the back portion of the house. The commandante placed all the remaining documents in a briefcase and handed the briefcase to Agent Bowen. Commandante Salazar told Agent Bowen to take all the documents and sort through them later because it was late and he wanted the search to end. Agent Bowen placed the briefcase in the DEA's car, and the MFJP and DEA agents left the Mexicali house. The DEA agents then returned to the United States with the seized documents. Once back in the United States, the DEA agents prepared inventories and written reports identifying the seized documents. Of the seized evidence, the government sought only to introduce a tally sheet found during the search of the Mexicali residence. The tally sheet purportedly reflects the

quantities of marijuana smuggled by Verdugo-Urquidez into the United States.

b. *Analysis of Mexicali Search*

Based on the facts found by the district court, which the government does not contend are clearly erroneous, we conclude the searches of the Mexicali and San Felipe residences were American searches to which the fourth amendment applies. Indeed, given the high degree of American involvement in the searches and the low degree of Mexican interest in Verdugo-Urquidez, we do not even find the question a close one.

This is not a case in which United States agents merely supplied a tip to a foreign law enforcement agency, which then conducted an investigation and made a search or arrest leading to an American prosecution. *See, e.g., United States v. Hawkins,* 661 F.2d 436, 455-56 (5th Cir. Unit B Nov. 1981); *United States v. Heller,* 625 F.2d 594, 600 (5th Cir.1980). Neither is this a case in which a foreign government invited American agents to observe an arrest or a search of interest to both countries. *See, e.g., United States v. Rosenthal,* 793 F.2d 1214, 1231 (11th Cir.), *modified,* 801 F.2d 378 (1986), *cert. denied,* __ U.S. __, 107 S.Ct. 1377, 94 L.Ed.2d 692 (1987); *United States v. Benedict,* 647 F.2d 928, 930-31 (9th Cir.), *cert. denied,* 454 U.S. 1087, 102 S.Ct. 648, 70 L.Ed.2d 624 (1981). This also is not a case illustrating legitimate international law enforcement cooperation in which American or foreign law enforcement officials contacted their counterparts in other countries to plan a joint operation in which the American involvement is minimal. *See, e.g., United States v. Maher,* 645 F.2d 780, 783 (9th Cir.1981); *United States v. Morrow,* 537 F.2d 120, 139-40 (5th Cir.1976). Finally, this is not a case in which we must decide whether American law

enforcement officials induced their foreign counterparts to conduct a search in order for the American agents to circumvent the fourth amendment. *See, e.g., United States v. Paternina-Vergara,* 749 F.2d 993, 998 (2d Cir.1984), *cert. denied,* 469 U.S. 1217, 105 S.Ct. 1197, 84 L.Ed.2d 342 (1985); *United States v. Hawkins,* 661 F.2d 436, 456 (5th Cir. Unit B Nov. 1981).

The present case is similar to two other cases in which a "joint venture" has been found. In *United States v. Emery,* 591 F.2d 1266 (9th Cir.1978), a "joint venture" was found because the DEA tipped the Mexican authorities to a possible smuggling transaction to take place in Mexico. The DEA, however, also planted an undercover operative with the suspected narcotics trafficker. Moreover, the DEA coordinated the surveillance of the suspected site of the transaction, and gave the prearranged signal for the Mexican police to move in and make the arrest. *Id.* at 1267. Similarly, in *United States v. Peterson,* 812 F.2d 486 (9th Cir.1987), a "joint venture" between the DEA and Phillipine authorities was found because the DEA's role was not subordinate to that of the Phillipine police. *Id.* at 490.

The present case falls within the scope of this "joint venture" doctrine. Indeed, many of the facts in this case are precisely those found to be lacking in our seminal *Stonehill* decision, which explained the doctrine we are now applying. Here, it was the American authorities who planned and instigated the searches to secure evidence to be used in an American trial; there was no existing Mexican investigation of Verdugo-Urquidez then under way. *But see Stonehill v. United States,* 405 F.2d 738, 646 (9th Cir.1968); *cert. denied,* 395 U.S. 960, 89 S.Ct. 2102, 23 L.Ed.2d 747 (1969). Second, the activities of the DEA took place before, during and after the search. *But see id.* Third, before the search began the MFJP informed the

DEA that they could keep all evidence seized during the search. *But see id.* Fourth, it was the DEA who took the initiative in ensuring the search took place soon after Verdugo-Urquidez's arrest. *But see id.* Finally, when the DEA contacted the MFJP about the search, they were not only seeking assistance from the Mexican police, they were asking for permission to run their own operation. It was Agent Bowen who specified which documents were the objects of the search. The MFJP officers brought the documents they found to Agent Bowen for him to evaluate their relevance to his objectives. All the seized documents were kept by the DEA. Indeed, the MFJP's interest in the search was so minimal that when the commandante grew tired, he simply placed all unsorted documents into a single briefcase and gave the briefcase to Agent Bowen. In short, it is clear that the DEA controlled the operation.

4. *Fourth Amendment Requirements*

Having determined that the fourth amendment applies to the DEA's search of the Mexicali residence, we must answer the question: "What does the fourth amendment require in this case?" The government invites us to hold that the DEA agents relied in good faith on the assurances of Mexican government officials that the search was permissible under Mexican law, and, therefore, under *United States v. Peterson,* 812 F.2d 486 (9th Cir.1987), the evidence obtained in the search should not be suppressed. We decline to do so.

In *Peterson*, DEA agents participated in a joint operation to tap a telephone at the defendant's apartment in the Philippines. Information obtained from the wiretap permitted the Coast Guard to locate a ship loaded with marijuana. The Coast Guard stopped the ship on the high seas, boarded it, searched it and seized the marijuana. We stated:

> Assuming that this was a stop and a search for criminal violations at the outset, and that fourth amendment protections are fully applicable, a point that is far from settled, there was probable cause to search and seize the vessel, its cargo, and its crew. Searches of vessels on the high seas in such circumstances may be warrantless, as the location of the vessels and the practical difficulties of obtaining a warrant while at sea present exigent circumstances under well-accepted principles. We find, therefore, no constitutional or other invalidity in the stop, the board, the search, or the seizure of the evidence in this case.

Id. at 494 (internal citations omitted).

The warrantless search of the vessel in *Peterson* was permissible due to exigent circumstances inherent in a high seas search. *See id.* We assumed that the earlier telephone tap in the Philippines violated Philippine law "and was, as a result, not reasonable under the fourth amendment." *Id.* at 491. We determined, however, that the DEA officers could rely in good faith on the assurances given them by Philippine officials that the telephone tap was legal under Philippine law. This good faith reliance removed the taint from the violation of Philippine law so that the search of the vessel, valid in its own right, was not rendered illegal under the fourth amendment. *See id.* at 492.

In the present case, the parties dispute whether the search violated Mexican law. We do not decide this question. Nor do we assume that Mexican law was or was not violated, or what effect a violation of Mexican law would have on the question of the validity of the search under the fourth amendment. What we do decide is the question we are presented: Did the search of Verdugo-Urquidez's Mexicali residence violate the fourth amendment? If it did,

whether it also may have violated Mexican law is irrelevant.

The fourth amendment does not prohibit all searches, only unreasonable searches. Two requirements typically follow from this proposition. First, "searches and seizures must be supported by probable cause" to be valid. *See United States v. Winsor*, 846 F.2d 1569, 1575 (9th Cir. 1988) (en banc). Second, as the Supreme Court repeatedly has emphasized, "a cardinal principle [of the fourth amendment is] that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable.' " *Mincey v. Arizona*, 437 U.S. 385, 390, 98 S.Ct. 2408, 2412, 57 L.Ed.2d 290 (1978) (quoting *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 514, 19 L.Ed.2d 576 (1967)). Thus, in most cases, a search is *per se* unreasonable if the police do not obtain a *warrant*, which a magistrate or judge finds to be supported by *probable cause*.

In the context of the fourth amendment, the Court has carved out "a few specifically established and well-delineated exceptions" to the warrant requirement. *Mincey*, 437 U.S. at 390, 98 S.Ct. at 2412 (quoting *Katz*, 389 U.S. at 357, 88 S.Ct. at 514). In other cases, the Court has carved out exceptions to the "probable cause" requirement. *See United States v. Winsor*, 846 F.2d at 1576-77 (collecting and discussing cases). In the present case, the DEA searched Verdugo-Urquidez's residence. "[T]he Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant." *Steagald v. United States*, 451 U.S. 204, 212, 101 S.Ct. 1642, 1647, 68 L.Ed.2d 38 (1981) (internal quotation marks and citations omitted). Exigent circumstances were not present in this case. We must decide, therefore, whether the DEA should have obtained a warrant before conducting the search.

The warrant requirement serves to interpose a "neutral and detached magistrate" between the public and the police officer, who is "engaged in the often competitive enterprise of ferreting out crime." *Coolidge v. New Hampshire*, 403 U.S. 443, 449, 91 S.Ct. 2022, 2029, 29 L.Ed.2d 564 (1971) (quoting *Johnson v. United States*, 333 U.S. 10, 14, 68 S.Ct. 367, 369, 92 L.Ed. 436 (1948)). The magistrate's independent evaluation of whether law enforcement officials have probable cause to search assures that constitutional freedoms are not infringed by zealous law enforcement efforts. *See, e.g., id.* at 450, 91 S.Ct. at 2029 ("[T]he whole point of the basic rule . . . is that prosecutors and policemen simply cannot be asked to maintain the requisite neutrality with regard to their own investigations."); *see also Steagald*, 451 U.S. at 213, 101 S.Ct. at 1648. In the present case, however, a warrant issued by an American magistrate would be a dead letter in Mexico. As the district court itself recognized, "a United States warrant, in itself, cannot give United States officers the authority to enter a foreign residence and conduct a search." [CR 384, at 16]. International law enforcement is a cooperative venture and it would be an affront to a foreign country's sovereignty if the DEA presented an American warrant and suggested that it gave the American agents all the authority they needed to search a foreign residence.

Notwithstanding this geographic limitation, we cannot relieve the government from its obligation to obtain a search warrant simply because the place to be searched by the government is outside this country. To do so would be to treat foreign searches differently from domestic searches just because they are foreign. If the constitutional protection of the fourth amendment applies to our government's search of the Mexicali residence, as we have held it does, there is no justification to amputate from the body

of that protection the appendage that requires a detached magistrate's advance determination of probable cause and the issuance of a warrant. If the residence were located in the United States, we would conclude that the evidence sought to be introduced in this case would have to be suppressed because the government did not obtain a warrant and no exigent circumstances existed. We can discern no logical reason to formulate a different rule just because the residence to be searched happens to be in Mexico. True, an American search warrant would be of no legal validity in Mexico, but it would have substantial constitutional value in this country. And it is in this country that Verdugo-Urquidez is being prosecuted for alleged violations of United States law. A warrant issued by a detached magistrate here would reflect the magistrate's determination that probable cause to search existed. It also would define the scope of the search. These constitutional protections are afforded by the warrant requirement; they are not affected by whether or not a foreign government would give legal effect to the warrant.

We conclude that the protection of the fourth amendment extends to the government's search of the Mexicali residence. Since the DEA obtained no warrant to make that search, and because exigent circumstances were lacking, the search was unlawful under the fourth amendment. Accordingly, the evidence obtained in that search was properly suppressed.

AFFIRMED.

WALLACE, Circuit Judge, dissenting:

In holding that the fourth amendment applies to a foreign search of a foreign nation's residence, the majority fails to mention, much less attempt to explain, the Supreme Court's seemingly unequivocal pronouncement that "[n]either the Constitution nor the laws passed in pursuance of it have any force in foreign territory unless in respect of our own citizens." *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318, 57 S.Ct. 216, 220, 81 L.Ed. 255 (1936) (*Curtiss-Wright*).

Verdugo is not an American citizen. He does not reside in the United States. The search in this case occurred in a foreign country. Yet the majority concludes that Verdugo, a Mexican citizen residing in Mexico, is entitled to invoke the fourth amendment to suppress evidence obtained in a search that occurred on Mexican soil. That a nonresident alien has any reasonable expectation of privacy in his foreign country with respect to our government is so startling a proposition to me that, even if the Supreme Court had not written *Curtiss-Wright*, it would be difficult for me to accept such an illogical proposition in the absence of compelling precedent or sound reasoning. The majority, however, provides us with neither.

The reasoning by which the majority reaches this result is severely flawed. From one line of Supreme Court cases establishing that American *citizens* have constitutional rights abroad and another line holding that aliens in the United States are entitled to constitutional safeguards against certain actions taken by our officials *in this country*, the majority, without explanation, arrives at the conclusion that a *foreign national* residing in a *foreign country* is entitled to fourth amendment rights against actions taken by our officials *on foreign soil*. The majority's leap in logic is not just a *non sequitur*; it also ignores the self-imposed limitations on the geographic reach of the Constitution—limitations that have been endorsed by the Supreme Court.

I

Because there is no direct Supreme Court precedent, I agree with the majority that we must inform our judgment

by the language of the Constitution, its history, and by Supreme Court cases dealing with the constitutional rights of aliens in analogous contexts. But upon examining the text and history of the Constitution and applying the guiding principles that I have deduced from the Supreme Court precedents, I am convinced that the fourth amendment does not apply to a search in Mexico of property belonging to a Mexican citizen whose permanent residence is in Mexico.

A.

My inquiry begins with the language of the Constitution itself. By ratifying the Constitution, the people of the United States created a limited national government. The government was to possess only those powers that the people chose to confer upon it. This notion of governmental power derived from the people is evident in the Preamble to the Constitution: "We The People Of The United States . . . do ordain and establish this Constitution for the United States of America." While many believed that this limited grant of power to the national government carried with it the implied reservation of certain fundamental rights of the individual, others demanded a Bill of Rights that would expressly forbid to the federal government the power to encroach upon these rights.

Among these basic rights is the right to be free from unreasonable searches and seizures by the government. To this end, the fourth amendment provides that:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

By its express terms, the rights set forth in this amendment are secured to "the people." Who "the people" are must be found by reading the amendment in the context of the entire document. In doing so, it appears that "the people" referred to in the amendment are "The People" in the Preamble who endowed the federal government with certain limited, enumerated powers. Only an unduly strained reading of the fourth amendment's "the people" could lead to any other conclusion. Because "The People" in the fourth amendment are only "The People of the United States," it follows that the fourth amendment extends its protective blanket to Verdugo only if he may properly be considered one of *the people of the United States.*

B.

My conclusion that the fourth amendment protects only the people of the United States is supported by an examination of our constitutional history, which indicates that the Constitution was conceived as a "compact" or "social contract" among the people of the United States. In our pre-constitutional era, the "compact" or "social contract" concept of government pervaded American political philosophy, both in theory and in practice. For example, in 1620 the Pilgrims entered into the Mayflower Compact, in which they proclaimed that "[w]e . . . solemnly and mutually . . . covenant and combine ourselves together into a civil Body Politick, for our better Ordering and Preservation." Mayflower Compact, November 11, 1620, *reprinted in Sources of Our Liberties: Documentary Origins of Individual Liberties in the United States Constitution and Bill of Rights* 60 (R. Perry ed. 1959) (hereinafter "*Sources of Our Liberties*")). Less than a score of years later, in 1639, the residents of Connecticut formally established by mutual agreement a government

by ratifying the Fundamental Orders of Connecticut. *Sources of Our Liberties* at 115; A. Kelly & W. Harbison, *The American Constitution: Its Origins and Development* 94 (3d ed. 1963) (hereinafter A. Kelly & W. Harbison).

Prevalent during the period leading to the American Revolution was the recurrent notion that a government was created by a compact among those governed and that the government could not infringe certain rights of those empowering it. John Locke, one of the most influential political philosophers of the time, conceived of government as a social compact in which formerly free individuals voluntarily united to establish communities. In order to protect what he considered to be a person's most essential liberties, Locke believed it was necessary that each person surrender some part of his or her natural independence. *See* J. Kettner, *The Development of American Citizenship, 1608-1870* 44 (1978). Of particular relevance to the revolutionary sentiment that was mounting at the time was Locke's vision of revolution as an act that undid all existing political compacts, thereby leaving the people free to enter willingly into a new political compact. A. Kelly & W. Harbison at 94.

Angered by the treatment of the American Colonies by England, in 1774 the Continental Congress petitioned the Crown for redress of grievances. In its Declaration and Resolves, the Continental Congress proclaimed its belief that the colonists were entitled to basic civil liberties by virtue of natural law, English constitutional principles, and their "several charters or compacts." Continental Congress, Declaration and Resolves, October 14, 1774, *reprinted in The Founders' Constitution* 2 (P. Kurland & R. Lerner ed. 1987). As Alexander Hamilton stated:

> [T]he origin of all civil government, justly established, must be a voluntary compact between the rulers and the ruled, and must be liable to such limitations as are necessary for the security of the absolute rights of the latter.

A. Hamilton, *The Farmer Refuted,* Feb. 23, 1775, in *The Founders' Constitution* at 91. When the leaders of the American colonies finally proclaimed their separation from English sovereignty in the Declaration of Independence, they declared that in order to secure certain inalienable rights, "governments are instituted among men, deriving their just powers from the consent of the governed." Declaration of Independence, July 4, 1776, in *Sources of Our Liberties* at 319.

After the American Revolution, the American people continued to envisage government as a voluntary compact between the people of each sovereign state. For example, in the Preamble to the Massachusetts Constitution of 1780, the people of that state expressly proclaimed their new government to be a compact among those governed:

> The body politic is formed by a voluntary association of individuals: it is a social compact, by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good.

Constitution of Massachusetts, October 29, 1780, in *Sources of Our Liberties* at 373.

Examining the Constitutional Convention against this background, it is not surprising that when the Framers set about the task of drafting the Constitution of the United States, they conceived of it as a "compact" or "social contract." *See* A. Kelly & W. Harbison at 165. Moreover, implicit in their understanding that the Constitution would be a compact was the realization that correlative rights and obligations would govern relations between the people and their newly-created national government. In return of cer-

tain guarantees restricting the scope of government, the people of the states ceded to a central authority limited powers of government. On this point, the cover letter transmitting the Constitution and signed by George Washington is telling:

> It is obviously impracticable in the federal government of these states, to secure to all rights of independent sovereignty to each, and yet provide for the interest and safety of all: Individuals entering into society must give up a share of liberty to preserve the rest. . . . [T]he Constitution, which we now present, is the result of a spirit of amity, and of that mutual deference and concession, which the peculiarity of our political situation rendered indispensable.

Sources of Our Liberties at 418. Hence, it appears that the Framers understood that the social compact embodied in the Constitution necessarily required that the people give up some degree of liberty in order for them to secure others in return.

Because the social compact theory of the Constitution contemplates that each individual will give up a share of liberty to preserve the rest, I believe that the majority errs in suggesting that the compact theory is undermined by the presence of the theory which emphasizes the "natural rights" of men. Maj. op. at 13-15. Viewing the compact and natural rights paradigms as mutually exclusive misperceives the interrelationship between these two. As can be seen from the majority's historical citations, the natural rights theory was usually espoused in documents declaring independence or rights. Taken in context, there is no conflict. While the Framers may have understood the liberties enumerated in the Bill of Rights to reflect man's "natural rights," they also recognized that the Constitution embodies a compact among the People of the United States

to sacrifice some modicum of these "natural rights" in order to create a central government capable of preserving the rest. *See Sources of Our Liberties* at 418. Thus, rather than coexisting in tension with the compact theory, the "natural rights" theory fits comfortably into its central tenet.

C.

A number of fundamental axioms can be deduced from the Constitution's regime of reciprocal rights and obligations. Chief among these is that one can make no claim of entitlement to rights without also assuming corresponding obligations. No one can seriously doubt that the compact applies only to the people who empowered the government of the United States for the benefit of themselves and their posterity, not to other peoples of the world who neither ceded authority to it in exchange for certain guarantees of liberty nor otherwise consented to its rule.

These axioms find support in an unbroken line of Supreme Court cases reflecting the understanding of the Constitution as a compact between the people of the United States and its government. In *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 1 L.Ed. 440 (1793), Chief Justice Jay observed that every state constitution "is a compact . . . and the Constitution of the United States is likewise a compact made by the people of the United States to govern themselves." *Id.* at 471. Similarly, in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 4 L.Ed. 579 (1819), Chief Justice Marshall proclaimed that "[t]he government of the Union . . . is, emphatically and truly, a government of the *people*. . . . [i]t emanates from them. Its powers are granted by them, and are to be exercised directly on them, and *for their benefit*." (Emphasis added.) In *League v. De Young*, 52 U.S. (11 How.) 185,

203, 13 L.Ed. 657 (1850), the Supreme Court recognized that "[t]he Constitution of the United States was made by, and for *the protection of, the people of the United States.*" (Emphasis added.) While the majority is correct in observing that these cases dealt with issues of federalism, rather than the extraterritorial reach of the Constitution, it is nonetheless true that in these cases the Supreme Court placed its imprimatur on the general notion that the Constitution is a compact made by The People of the United States for their own benefit and protection.

In later cases, the Court reasoned that because the government was "ordained and established for the United States of America, and not for countries outside of [its] limits, . . . [t]he Constitution can have no operation in another country." *In re Ross,* 140 U.S. 453, 464, 11 S.Ct. 897, 900, 35 L.Ed. 581 (1891). Applying this rule, the Court rejected the claim that an American citizen being tried abroad in a consular court was entitled to the Constitution's grand jury and petit jury guarantees. According to this restrictive view of the Constitution's reach, not even American citizens could invoke its guarantees outside the territorial limits of the union. *See also Downes v. Bidwell,* 182 U.S. 244, 270-71, 21 S.Ct. 770, 780, 45 L.Ed. 1088 (1901) (the Constitution does not apply to foreign countries or to trials conducted therein).

The majority's insistence that *Ross* actually supports Verdugo's position evinces its failure to understand a critical distinction regarding the geographic limits of an alien's constitutional rights. *Ross* does not answer whether Verdugo was entitled to suppress on fourth amendment grounds the evidence seized from his Mexicali residence. As I will explain later in Part II.B., just because a foreign national may be entitled to fifth and sixth amendment rights during the charging and trial process does not shed light on whether he is endowed with *extraterritorial* fourth

amendment rights. Indeed, both reason and precedent justify extending fifth and sixth amendment trial-related rights to a nonresident alien while, at the same time, denying such an alien *extraterritorial* fourth amendment rights.

The foregoing cases reflect an understanding of the Constitution as a blanket of protections covering only the "people" who endowed their government with its powers and who remain physically present within the borders of the nation. Since these early decisions, however, both the Supreme Court and the circuit courts have expanded the territorial reach of the Constitution, including the protections of the Bill of Rights, to *Americans* abroad. *Reid v. Covert,* 354 U.S. 1, 5-14, 77 S.Ct. 1222, 1224-29, 1 L.Ed.2d 1148 (1957) (*Reid*); *see also United States v. Emery,* 591 F.2d 1266, 1267-68 (9th Cir.1978) (*Miranda* rights); *United States v. Rose,* 570 F.2d 1358, 1362 (9th Cir.1978) (fourth amendment); *United States v. Conroy,* 589 F.2d 1258, 1264 (5th Cir.) (fourth amendment), *cert. denied,* 444 U.S. 831, 100 S.Ct. 60, 62 L.Ed.2d 40 (1979). *Reid* rested upon the view that "[w]hen the government reaches out to punish a *citizen* who is abroad, the shield which the Bill of Rights . . . provide[s] to protect his life and property should not be stripped away just because he happens to be in another land." *Reid,* 354 U.S. at 6, 77 S.Ct. at 1225 (emphasis added). In addition, recent cases reveal that certain aliens within our borders can also be considered "people of the United States." *See Kwong Hai Chew v. Colding,* 344 U.S. 590, 596, 601, 73 S.Ct. 472, 479, 97 L.Ed. 576 (1953) (*Kwong Hai Chew*) (holding that a *resident* alien is a "person" within the meaning and protection of the fifth amendment). Both resident and illegal aliens are entitled to a wide range of constitutional protections *while in this country. See, e.g., Plyler v. Doe,* 457 U.S. 202, 210, 102 S.Ct. 2382, 2391, 72 L.Ed.2d 786 (1982) (illegal aliens may claim equal protection rights be-

cause these pertain to "any person within [a state's] jurisdiction"); *Hamilton v. Mow Sun Wong*, 426 U.S. 88, 96 S.Ct. 1895, 48 L.Ed.2d 495 (1976); *Au Yi Lau v. INS*, 445 F.2d 217, 223 (D.C.Cir.) (aliens in this country are sheltered by the fourth amendment), *cert. denied*, 404 U.S. 864, 92 S.Ct. 64, 30 L.Ed.2d 108 (1971); *Wong Wing v. United States*, 163 U.S. 228, 237-38, 16 S.Ct. 977, 980-81, 41 L.Ed. 140 (1896) (*Wong Wing*) (aliens may invoke fifth and sixth amendments); *Yick Wo v. Hopkins*, 118 U.S. 356, 369, 6 S.Ct. 1064, 1070, 30 L.Ed. 220 (1886) (fourth amendment is not confined to the protection of citizens).

These cases reveal that "the people of the United States" include American citizens at home and abroad and aliens within our country's borders who are victims of actions taken *in the United States* by American officials. The Supreme Court, however, has never held that the Bill of Rights protects foreign nationals residing abroad from *actions taken abroad* by our officials. Hence, the majority paints with too broad a brush when it deduces that "[t]he Constitution imposes substantive constraints on the federal government, even when it operates abroad." Maj. op. at 1218. This sweeping statement pretermits the crucial caveat that the extraterritorial effect of the Constitution has never been extended by the Supreme Court to persons other than American *citizens*. Predictably, the majority fails to cite a single Supreme Court case suggesting that the Constitution limits government action against *foreign nationals* in territory under foreign dominion. Neither *Reid* nor *Balzac v. Puerto Rico*, 258 U.S. 298, 312-13, 42 S.Ct. 343, 348, 66 L.Ed. 627 (1922) (*Balzac*), the two cases relied upon by the majority, support such a strained reading of the Constitution's extraterritorial scope. *Reid* speaks only of the extraterritorial rights of American *citizens*. *See* 354 U.S. at 6, 77 S.Ct. at 1225. *Balzac*, contrary to the majority's assertion, does not adopt "a more expansive vision" of

the Constitution's extraterritorial force. In that case, the Supreme Court simply recognized the elementary proposition that in territories where the United States is sovereign, the Constitution is in force. *See Balzac*, 258 U.S. at 312-13, 42 S.Ct. at 348. How *Balzac* is relevant to the instant case thus escapes me. The complained of search in this case did not occur in a territory under the sovereign power of the United States. Rather, it occurred in Mexico under the sovereign power of the Mexican government. Thus stripped of all its case support, the majority's broad reading of the Constitution's extraterritorial reach finds support only in citations to academic literature. Law review articles, however, are not the law.

Extending the protective veil of the Constitution to constrain the actions taken by our agents abroad against foreign nationals residing in foreign territory would be entirely inconsistent with the view that the Constitution embodies a contract between the people of the United States and its government. On the contrary, as I observed at the beginning of my dissent, the Supreme Court has explicitly declared that "[n]either the Constitution nor the laws passed in pursuance of it have any force in foreign territory unless in respect of our own citizens." *Curtiss-Wright*, 299 U.S. at 318, 57 S.Ct. at 220. Consistent with this principle, the Supreme Court has long recognized that aliens who are beyond the territorial limits of the United States stand on a different constitutional footing than those residing either permanently or temporarily within our borders. For instance, while the Court has recognized in the immigration context that "an alien who has entered the country, and has become subject in all respects to its jurisdiction, and a part of its population" is entitled to due process under the fifth amendment, *The Japanese Immigrant Case*, 189 U.S. 86, 101, 23 S.Ct. 611, 614, 47 L.Ed. 721 (1903), aliens who have not yet entered our borders are

accorded only that degree of process provided by "the decisions of executive or administrative officers, acting within powers expressly conferred by Congress." *Nishimura Ekiu v. United States*, 142 U.S. 651, 660, 12 S.Ct. 336, 339, 35 L.Ed. 1146 (1892). Congress may, in fact, "exclude [an alien] in the first instance for whatever reason it sees fit," because "an alien obviously brings with him no constitutional rights." *Bridges v. Wixon*, 326 U.S. 135, 161, 65 S.Ct. 1443, 1455, 89 L.Ed. 2103 (1945) (Murphy, J., concurring); *see also United States ex rel. Turner v. Williams*, 194 U.S. 279, 292, 24 S.Ct. 719, 723, 48 L.Ed. 979 (1904) (*Turner*) (an alien attempting to enter this country illegally is not one of the people to whom first amendment rights are secured).

An uninterrupted line of cases reaffirms to the present day this distinction between the constitutional rights of excludable aliens, those seeking admission into the United States, and deportable aliens, those already within the United States. *See, e.g., Landon v. Plasencia*, 459 U.S. 21, 32, 103 S.Ct. 321, 329, 74 L.Ed.2d 21 (1982) (*Plasencia*); *Leng May Ma v. Barber*, 357 U.S. 185, 187, 78 S.Ct. 1072, 1073, 2 L.Ed.2d 1246 (1958); *Kwong Hai Chew*, 344 U.S. at 600, 73 S.Ct. at 479 (" 'excludable' aliens . . . are not within the protections of the Fifth Amendment"). Moreover, the Court in *Kwong Hai Chew*, quoting an earlier decision, carefully reminded us that "in extending constitutional protections beyond the citizenry, the Court has been at pains to point out that it was the alien's presence within its territorial jurisdiction that gave the Judiciary power to act." 344 U.S. at 596-97 n. 5, 73 S.Ct. at 477 n. 5, *quoting Johnson v. Eisentrager*, 339 U.S. 763, 770-71, 70 S.Ct. 936, 940, 94 L.Ed. 1255 (1950) (*Johnson*) (holding that nonresident enemy aliens who had never been in the United States were not entitled to constitutional protections). It is, therefore, clear that our Bill of Rights distinguishes between resident and nonresident aliens. *See Kwong Hai Chew*, 344 U.S. at 596, 73 S.Ct. at 477 (a permanent resident is a person within the meaning of the fifth amendment).

The significance of residency within the United States to the question of the constitutional rights of aliens crystallizes when considered in the context of the compact theory. In discussing the greater rights that attach as one progresses from the status of a nonresident alien to a permanent resident alien to a naturalized citizen, the Court in *Johnson* implicitly recognized that as the concomitant to assuming ever-increasing obligations to the United States, one receives correspondingly greater rights. 339 U.S. at 769-71, 70 S.Ct. at 939-40. By voluntarily establishing residency within the United States, whether temporarily or permanently, aliens owe a local and temporary allegiance to the United States during the period of their residency. *See Carlisle v. United States*, 83 U.S. (16 Wall.) 147, 154, 21 L.Ed. 426 (1873). As a consequence of this obligation of allegiance, aliens are entitled to many of the same rights as citizens. *See Johnson*, 339 U.S. at 770, 70 S.Ct. at 939. These rights, as I pointed out earlier, increase as an alien develops increasingly greater ties that evidence an intent to make the United States his permanent residence. *See id.*; *Plasencia*, 459 U.S. at 32, 103 S.Ct. at 329.

An alien who chooses to establish his residency in the United States, however, like any citizen, pays a price for these rights over and beyond the exaction of his temporary allegiance. In return for these constitutional guarantees, aliens must assume certain duties and obligations. Indeed, in *Eisler v. United States*, 170 F.2d 273 (D.C.Cir.1948) (*Eisler*), *cert. dismissed*, 338 U.S. 883, 70 S.Ct. 181, 94 L.Ed. 542 (1949), the District of Columbia Circuit explicitly recognized the reciprocal nature of the rights and obligations of aliens residing in the United States:

> Once an alien lawfully enters and resides in this country he becomes invested with the rights, except those incidental to citizenship, guaranteed by the Constitution to all people within our borders. Correlatively, an alien owes a temporary allegiance to the Government of the United States, and he assumes duties and obligations which do not differ materially from those of native-born or naturalized citizens. . . .

Id. at 279 (citation omitted). Thus, not only do resident aliens owe a duty of allegiance to the United States, but they are bound to obey all laws of the United States other than those related to citizenship, *Radich v. Hutchins,* 95 U.S. 210, 211, 24 L.Ed. 409 (1877), contribute to the support of government, and even be called to serve in the national defense. *See Eisler,* 170 F.2d at 279; *Leonhard v. Eley,* 151 F.2d 409, 410 (10th Cir.1945); Military Selective Service Act, 50 U.S.C.A.App. § 453 (Supp.1988).

The Supreme Court has also acknowledged as a corollary of the social contract theory, the maxim that "the Government's obligation of protection is correlative with the duty of loyal support inherent in the citizen's allegiance." *Johnson,* 339 U.S. at 770, 70 S.Ct. at 939. On the basis of this duty of loyalty, the Court has differentiated between the rights of citizens and nonresident aliens *complaining of unconstitutional actions by United States agents abroad. Id.* Accordingly, some measure of allegiance to the United States, as evidenced by citizenship or residency, is the quid pro quo for receiving the privilege of invoking our Bill of Rights as a check on the extraterritorial actions of United States officials.

My reading of these cases convinces me that the scope of an alien's rights depends intimately on the extent to which he has chosen to shoulder the burdens that citizens must bear. Not until an alien has assumed the complete range of

obligations that we impose on the citizenry may he be considered one of "the people of the United States" entitled to the full panoply of rights guaranteed by our Constitution.

I conclude, therefore, that Verdugo, as a nonresident Mexican citizen, does not enjoy the full panoply of rights guaranteed to "the people of the United States" by our Constitution. His obligation to refrain from violating our drug laws in his dealings with our citizens does not place upon him a burden sufficient to entitle him to the entire spectrum of constitutional rights available to citizens or resident aliens. He has neither undertaken to support our government, nor has he placed himself in a position where he might be called to serve in the national defense. More important, however, as a nonresident alien, he has assumed no duty of allegiance to the United States.

This is not to say that Verdugo receives no rights whatsoever in exchange for his obligation to stand trial in the United States for alleged violations of our narcotics laws. I do not question that he is entitled to a fair judicial trial. Even as a nonresident alien, Verdugo is cloaked with fifth and sixth amendment rights during the actual charging and trial process in a criminal prosecution. Nearly a century ago, when Congress sought to criminalize violations of our immigration laws by subjecting aliens unlawfully present in this country "to infamous punishment at hard labor, or by confiscating their property," the Supreme Court held that "such legislation, to be valid [under the Constitution], must provide for a judicial trial to establish the guilt of the accused." *Wong Wing,* 163 U.S. at 237, 16 S.Ct. at 981; *Turner,* 194 U.S. at 291, 24 S.Ct. at 792. While the Court's decision was motivated in part by separation-of-powers or bill-of-attainder concerns, *see* 163 U.S. at 237, 16 S.Ct. at 981, 194 U.S. at 291, 24 S.Ct. at 792, it was also based upon the Court's interpretation of the fifth and sixth amendments as applying on their face

to "all persons within the territory of the United States." *Wong Wing*, 163 U.S. at 238, 16 S.Ct. at 981. Hence, the Court ruled that "even aliens shall not be held to answer for a capital or other infamous crime, unless on a presentment or indictment of a grand jury, nor be deprived of life, liberty, or property without due process of law." *Id.* I believe that by providing Verdugo with fifth and sixth amendment protections during the charging and trial phases of the criminal process, our government has given him ample consideration to justify subjecting him to our drug laws.

II

Verdugo, however, was detained in the United States on criminal charges at the time that his Mexicali residence was searched. This circumstance suggests two additional inquiries. First, one must ask whether Verdugo's physical presence in this country at the time the search occurred conferred upon him a "residence" status sufficient to trigger extraterritorial fourth amendment rights. Next, one must determine whether the fact that he was under criminal prosecution when the search took place carries any special significance for our fourth amendment jurisprudence.

A.

Being held in custody in the United States pending the disposition of criminal charges does not, in itself, establish the residency required to trigger fourth amendment protections. Long ago, the Supreme Court intimated that an alien "who has been here for too brief a period to have become, in any real sense, a part of our population," might not be eligible to invoke the due process clause of the fifth amendment. *See The Japanese Immigrant Case,*

189 U.S. at 100, 23 S.Ct. at 614; *cf. Leng May Ma v. Barber*, 357 U.S. 185, 187-88, 78 S.Ct. 1072, 1073-74, 2 L.Ed.2d 1246 (1958) (alien detained in custody pending determination of his admissibility is not "within the United States" although alien is physically present in United States). By emphasizing that its holding applied only to aliens who had resided in this country long enough to be considered "part of the population," 189 U.S. at 100-01, 23 S.Ct. at 614, the Court in *The Japanese Immigrant Case* acknowledged that the mere fact that one is physically present in the United States did not elevate one to the status of a resident alien endowed with the full panoply of constitutional protections. While the Court has subsequently recognized that the fifth amendment's guarantee of due process of law applies even to aliens "whose presence in this country is unlawful, involuntary, or transitory," *Mathews v. Diaz*, 426 U.S. 67, 77, 96 S.Ct. 1883, 1890], 48 L.Ed.2d 478 (1976) (*Mathews*), the Court also immediately thereafter cautioned that "[t]he fact that all persons, aliens and citizens alike, are protected by the Due Process Clause does not lead to the further conclusion that all aliens are entitled to enjoy all the advantages of citizenship, or indeed, to the conclusion that all aliens must be placed in a single homogeneous legal classification." *Id.* at 78, 96 S.Ct. at 1890.

Mathews's admonition is unremarkable. As we observed earlier, differentiating among different noncitizens based upon different circumstances has always been a part of our jurisprudence. That the protections of our Bill of Rights are not an all-or-nothing proposition where aliens are concerned was previously recognized by the Court in *Turner*. In that case, the Court saw no inconsistency in reaffirming its prior holding in *Wong Wing*, 163 U.S. at 238, 16 S.Ct. at 981, that the fifth and sixth amendments apply to criminal proceedings brought against illegal

aliens, while at the same time, opining that such aliens had no first amendment rights. *Turner*, 194 U.S. at 291-92, 24 S.Ct. at 722-23. Subsequently, in *Balzac*, 258 U.S. at 312, 42 S.Ct. at 348, the Court recognized that while the Constitution is "in force" wherever our sovereign power is exerted, as in our territories, "[t]he Constitution . . . contains grants of power and limitations which in the nature of things are not always and everywhere applicable." Clarifying its prior decisions regarding the scope of constitutional protections in our insular possessions, the Court observed that "the real issue [in those cases] was not whether the Constitution extended to [our territories] when we went there, but *which* of its provisions were applicable by way of limitation upon the exercise of executive and legislative power in dealing with new conditions and requirements." *Id.* According to *Balzac*, even where the United States is sovereign, the protections of the Constitution do not always extend indiscriminately to territories outside of the fifty states. Where the United States is *not* sovereign, as in Mexico, our constitutional protections may apply even more selectively. Hence, while Verdugo's brief, involuntary presence in this country may confer upon him fifth and sixth amendment rights during the criminal proceedings against him, it does not follow from this that, as a *nonresident alien* complaining of United States search that occurred on soil over which it is *not* sovereign, he is also invested with the protections of the fourth amendment.

Subsequent to its decisions in *Turner* and *Balzac*, the Supreme Court has recognized that aliens within our borders have "been accorded a generous and ascending scale of rights as [they] increase[ ] [their] identity with our society." *Johnson*, 339 U.S. at 770, 70 S.Ct. at 939; *accord Kwong Hai Chew*, 344 U.S. at 596-97 n. 5, 73 S.Ct. at 477 n. 5. "Mere lawful presence in the country creates an implied assurance of safe conduct and gives [the alien] certain rights; they become more extensive and secure when he makes a preliminary declaration of intention to become a citizen, and they expand to those of full citizenship upon naturalization." *Johnson*, 339 U.S. at 770, 70 S.Ct. at 940; *accord Kwong Hai Chew*, 344 U.S. at 596-97 n. 5, 73 S.Ct. at 477 n. 5. More recently, in *Plasencia*, 459 U.S. at 32, 103 S.Ct. at 329, the Court recognized that while "an alien seeking initial admission to the United States requests a privilege and has no constitution rights . . . once an alien gains admission to our country and begins to develop the ties that go with permanent residence his constitutional status changes accordingly." Thus, the degree of constitutional protection applicable to an alien is heavily dependent on the ties that he develops with this country through his residency status. Undoubtedly, the lack of constitutional protection for aliens residing outside our borders reflects their want of ties. Absent an intention to form bonds with the United States, no constitutional compact can be fairly implied.

We have been taught by the Supreme Court that nonresident aliens are not bestowed with the entire package of rights secured by the Bill of Rights. Knowing this, however, does not, in itself, tell us whether a nonresident alien is cloaked with extraterritorial fourth amendment rights simply by virtue of the fact that he was in custody in the United States when the search took place. While our precedent is indeterminate on this point, my reading of the language and history of the Constitution convinces me that while nonresident aliens may invoke the fifth and sixth amendments at trial, they may not fall back upon the fourth amendment to complain about a foreign search conducted by United States agents. As I have already observed, the fourth amendment extends its guarantees to "the people," meaning "the people of the United States."

Elsewhere in the Bill of Rights, the Framers sought to constrain the reach of the federal government in the name of "the people." Besides the fourth amendment, the name of "the people" is specifically invoked in the first, second, ninth, and tenth amendments. Presumably, "the people" identified in each amendment is coextensive with "the people" cited in the other amendments. No contrary indication appears in either the text or history of the Constitution.

Reading the foregoing amendments together in a self-consistent fashion, I cannot hold that "the people" includes within its ambit nonresident aliens who, for whatever reason, happen to find themselves temporarily in this country. In *Turner,* 194 U.S. at 292, 24 S.Ct. at 723, an excludable alien who had illegally entered the United States sought to invalidate a statute permitting Congress to exclude anarchists on the grounds that it violated his first amendment rights. The Supreme Court responded that such an alien did not become one of "the people" entitled to invoke the first amendment's protections merely by illegally entering this country. *Id.* Reading "the people" in the first and fourth amendments consistently would lead one to the same result for the fourth amendment. *A fortiori,* where the alleged unconstitutional actions occur in a *foreign* territory, a person in Verdugo's circumstance is in no position to appeal to the fourth amendment as one of "the people" of the United States.

The definitions of those entitled to fifth and sixth amendment protections are broader. Those rights are not restricted to "the people" but the fifth amendment protects every "person" while the sixth amendment protects every "accused." Despite this clear difference in the language of the fifth and sixth amendments, as compared with that of the fourth amendment, the majority continues to insist that "[i]t would be odd indeed to acknowledge that

Verdugo-Urquidez is entitled to due process under the fifth amendment, and to a fair trial under the sixth amendment, both of which rights he is accorded under established constitutional jurisprudence, and deny him the protection from unreasonable searches and seizures afforded under the fourth amendment." Maj. op. at 1224. Relying on the dictum of the plurality and the four dissenting opinions in *INS v. Lopez-Mendoza,* 468 U.S. 1032, 104 S.Ct. 3479, 82 L.Ed.2d 778 (1984) (*Lopez-Mendoza*), implying that *illegal* aliens have fourth amendment rights against unreasonable searches and seizures by INS officers, the majority further urges that it would be inconsistent to deny Verdugo fourth amendment rights in this case. According to the majority, "it seems absurd to grant the protection of the fourth amendment to one whose presence in the country is voluntary although illegal, and yet deny it to Verdugo-Urquidez, whose presence in the United States, although legal, is plainly involuntary." Maj. op. at 1224.

These statements by the majority indicate that it has overlooked what I believe to the crucial distinction between the cases cited by the majority and the instant case. When government officials violate a person's fifth and sixth amendment rights *at trial,* the constitutional infringement occurs *within the United States.* By contrast, when government officials violate a person's expectations of privacy in foreign territory, the complained of actions occur *on foreign soil.* In other words, the operative distinction between this case and the cases relied upon by the majority is *the locus of governmental action.* The fatal flaw in the majority's reliance on cases that have since extended various constitutional rights to aliens, whether they are legal or illegal, resident or mere visitor, is that none of these cases involves *extraterritorial* actions taken by our officials against aliens. Each one of these cases cited by the majority impose restraints on actions taken within United

States territory by the government. The challenged actions of the DEA agents in Verdugo's case, by contrast, occurred in Mexico under the sovereignty of the Mexican government. Hence, whether an alien is legally or illegally in this country, whether he is a permanent resident or temporary sojourner, or, for that matter, whether he was within or without United States jurisdiction at the time the acts occurred is not the decisive question in this case. Rather, the dispositive question with respect to Verdugo is where the unconstitutional actions of our government's agents took place. Simply put, not a single case cited by the majority extends constitutional protections to a nonresident alien with respect to actions taken by our officials on foreign soil. Thus, the majority's analysis is completely wide of the mark.

By focusing on the locus of government action, any apparent inconsistency between a holding that Verdugo is not entitled to *extraterritorial* fourth amendment rights and the Supreme Court's dicta in *Lopez-Mendoza* quickly vanishes. Equally important, focusing on where the government action occurred is the only way that the Supreme Court's various pronouncements on the constitutional rights of aliens can be reconciled. In the absence of a clear indication by the Court itself that it is overruling an earlier precedent, I believe that, as a circuit court, we are obligated to reconcile any apparent divergence in the Court's precedents as best we can. As I see it, we are faced with three guiding principles. First, the cases cited by the majority establish that all aliens are entitled to constitutional protections while they are in this country. *See, e.g., Yick Wo,* 118 U.S. at 369, 6 S.Ct. at 1070; *Wong Wing,* 163 U.S. at 238, 16 S.Ct. at 981; *Turner,* 194 U.S. at 291, 24 S.Ct. at 722; *Mathews,* 426 U.S. at 77, 96 S.Ct. at 1890; *Plyler,* 457 U.S. at 211, 102 S.Ct. at 2391. Second, the Constitution apparently follows American *citizens* when

they go abroad. *See Reid,* 354 U.S. at 6, 77 S.Ct. at 1225. Third, the *extraterritorial* force of the Constitution does not apply to persons other than our citizens or, perhaps, aliens with significant ties to the United States. *See Curtiss-Wright,* 299 U.S. at 318, 57 S.Ct. at 220; *Johnson,* 329 U.S. at 770, 70 S.Ct. at 939. The only way that all three principles can be reconciled is if aliens are accorded constitutional protections as against governmental action occurring in United States territory but not as against governmental action occurring on foreign soil. But, as I have previously observed, the majority does not attempt to solve its dilemma because it neglects to mention, much less distinguish, the Supreme Court's express restriction of the Constitution's extraterritorial life to American citizens in *Curtiss-Wright* and *Johnson.* Having completely ignored these cases, it comes as no surprise that the majority fails to recognize that the locus of the alleged unconstitutional action should determine whether an alien is entitled to constitutional protections.

Thus, as a matter of constitutional interpretation, no inconsistency results from holding that nonresident aliens are entitled to the same fifth and sixth amendment rights in a criminal proceeding as are citizens, while at the same time concluding that such aliens are not entitled to the extraterritorial protections that might conceivably apply to American citizens abroad. The American flag simply does not follow nonresident aliens beyond our territorial limits. As pointed out before, the Supreme Court has recognized that nonresident aliens do not stand on the same footing as American citizens when complaining of alleged unconstitutional actions of our agents in foreign countries. *See Johnson,* 339 U.S. at 770, 70 S.Ct. at 939.

B.

I next inquire whether my conclusion that a nonresident alien may not invoke the protections of the fourth amendment for foreign searches should be altered by the fact that Verdugo was under criminal prosecution at the time the search occurred. Having determined that the commands of the fourth amendment do not apply to extraterritorial searches of the residences of nonresident aliens who find themselves in custody in this country, I can find no basis for holding that the fourth amendment attaches merely because the subject of the search is under criminal prosecution in the United States. As I stated earlier, the fact that Verdugo, a foreign national, may be called to account for violations of our drug laws is insufficient to cloak him with the entire mantle of rights enjoyed by American citizen [*sic*] abroad. Hence, unlike a citizen or, perhaps, a permanent resident alien, Verdugo is not entitled under Supreme Court precedent to invoke the Constitution as a check on the actions of our government's DEA agents in Mexico.

I am aware of cases intimating that certain constitutional guarantees apply to anyone brought within the United States to be tried for a criminal offense. But as I indicated in part I.C., those cases are readily distinguishable because they relate to rights of the accused arising under the fifth and sixth amendments, which ensure fairness during the trial process itself. In *In re Ross,* for example, the Court suggested that anyone brought within the United States to be criminally prosecuted can invoke the sixth amendment's guarantees of a grand jury indictment and trial by jury. 140 U.S. at 464, 11 S.Ct. at 900. *Ross*'s holding, however, follows from the identical premise as the Court's decision in *Wong Wing,* namely, that the fifth and sixth amendments apply in a criminal proceeding to anyone, citizen and alien alike, within the territorial limits of the United States. 163 U.S. at 238, 16 S.Ct. at 981. In part II.A., I explained that under Supreme Court precedent, a nonresident alien can claim the protections of the Constitution *only* against governmental action perpetrated within territory under United States sovereignty. Fifth and sixth amendment violations during a trial conducted in the United States obviously involve acts occurring within United States territory. Unlike the right to a jury trial or to due process of law, however, fourth amendment violations do not occur at trial. Violations of the fourth amendment occur at the time the government intrudes unreasonably into a citizen's legitimate sphere of privacy. *Leon*, 468 U.S. 897 at 906, 104 S.Ct. 3405 at 3411, 82 L.Ed.2d 677 (1984); *United States v. Calandra,* 414 U.S. 338, 354, 94 S.Ct. 613, 623, 38 L.Ed.2d 561 (1974) (*Calandra*). No independent violation of the fourth amendment occurs when illegally seized evidence is introduced into a criminal proceeding. *Leon,* 468 U.S. at 906, 104 S.Ct. at 3411; *United States v. Janis,* 428 U.S. 433, 458-59 n. 35, 96 S.Ct. 3021, 3034, n. 35, 49 L.Ed.2d 1046 (1976) (*Janis*). Because Verdugo is not entitled to challenge the extraterritorial search of his residence, there is no fourth amendment bar to admitting the drug tally sheets in the criminal proceedings against him.

Nor does our prior decision in *United States v. Peterson,* 812 F.2d 486 (9th Cir. 1987), in which we had occasion to discuss the extraterritorial application of the fourth amendment, call for a different result. Unlike Verdugo, the appellants in *Peterson* were apparently American citizens. In that case, moreover, we did not hold that the fourth amendment applied to extraterritorial searches; we *assumed* for purposes of the appeal that the fourth amendment applied, but concluded that even if it applied to the foreign search in question, the federal officers' alleged

misconduct overseas was excused under *Leon*'s good faith exception to the exclusionary rule. *Id.* at 489, 491-92. Further, *Peterson* involved a search upon the high seas, an area of law governed by its own separate doctrine. *Id.* at 489. *Peterson* is thus inapplicable to the facts of this case.

With the exception of *United States v. Toscanino,* 500 F.2d 267 (2d Cir.1974) (*Toscanino*), which I will address in part III, the cases relied upon by the district court in support of its determination that the fourth amendment applies to the search of Verdugo's home in Mexico are either distinguishable or inapposite. *Cardenas v. Smith,* 733 F.2d 909, 915-17 (D.C.Cir.1984), suggested that a Colombian national might have standing to challenge violations of the fourth and fifth amendments resulting from a seizure of her Swiss bank account. By its own terms, however, the suggestion was mere dictum. *Id.* at 917. The court remanded the case for a finding of whether she was "in that group of aliens who are the intended beneficiaries of the relevant constitutional guarantees," and expressly refused to give any opinion on whether she would be able tc establish standing. *Id.* Similarly, the statement in *Jean v. Nelson,* 727 F.2d 957, 973 (11th Cir.1984), *aff'd on other grounds,* 472 U.S. 846, 105 S.Ct. 2992, 86 L.Ed.2d 664 (1985), that "aliens who are the victims of unconstitutional government action abroad are protected by the Bill of Rights if the government seeks to exploit fruits of its unlawful conduct in a criminal proceeding in the United States," was dictum because the Eleventh Circuit had no occasion to apply it to that case.

The district court also invoked *United States v. Cortes,* 588 F.2d 106, 110 (5th Cir.1979), and *United States v. Demanett,* 629 F.2d 862, 866 (3d Cir.1980), *cert. denied,* 450 U.S. 910, 101 S.Ct. 1347, 67 L.Ed.2d 333 (1981), for the proposition that aliens may mount fourth amendment challenges to searches beyond the United States' territorial

jurisdiction. Those cases, however, involved the boarding of vessels on the high seas, and are therefore distinguishable from the facts of this case. Searches on the high seas raise unique questions of sovereignty. "The high seas are generally not subject to the sovereignty of any state." Carmichael, *At Sea With the Fourth Amendment,* 32 U. Miami L.Rev. 52, 58 & n. 28 (1977) (*Carmichael*). "[U]nlike land borders, the region beyond the territorial boundaries at sea is not subject to the exclusive jurisdiction of any other sovereign and can be patrolled by United States vessels." Note, *High on the Seas: Drug Smuggling, The Fourth Amendment, and Warrantless Searches at Sea,* 93 Harv.L.Rev. 725, 733 & n. 46 (1980) (*Note*).

Each nation is accorded a limited right of sovereignty under maritime law over any vessel whose passage may affect certain national interests. Hence, a complex web of statutes, treaties, conventions, and universally accepted principles of international law authorizes the Coast Guard to board both foreign and domestic vessels on the high seas and within our territorial waters if such vessels are suspected of violating our laws. *See generally Church v. Hubbart,* 6 U.S. (2 Cranch) 187, 234-35, 2 L.Ed. 249 (1804); *United States v. Williams,* 617 F.2d 1063, 1079-84 (5th Cir.1980); *Carmichael* at 51-75 & accompanying notes; *Note* at 725-27 & accompanying notes. A vessel thus boarded becomes subject to our complete jurisdiction and sovereign power. Because "[t]he Constitution of the United States is in force . . . wherever and whenever the *sovereign* power of [our] government is exerted," *Balzac,* 258 U.S. at 312-13, 42 S.Ct. at 348 (emphasis added), it is not surprising that searches on the high seas may be subject to the fourth amendment, even when they are manned by foreign nationals.

In contrast, the residence of a foreign national on foreign soil is subject to the jurisdiction and control of the *foreign* sovereign. Consequently, such a foreign residence

is not protected by the Constitution, for "[n]either the Constitution nor [our] laws . . . have any force in foreign territory unless in respect of our own citizens." *Curtiss-Wright,* 299 U.S. at 318, 57 S.Ct. at 220. Verdugo's residences in Mexico were at all times under Mexican sovereignty. The DEA agents were in Mexico only as guests of the Mexican sovereign and were able to search Verdugo's residences only at the Mexican sovereign's pleasure. Hence, the cases involving searches on the high seas are inapplicable to the searches of Verdugo's residences in Mexico.

Nor does our prior decision in *In re Aircrash in Bali, Indonesia on April 22, 1974,* 685 F.2d 1301 (9th Cir.1982) (*Bali*), govern this appeal. We granted Australian plaintiffs in that case standing to challenge the constitutionality of the Warsaw Convention's limitation on liability in air carrier accidents. We recognized that under *Wong Wing,* 163 U.S. at 238, 16 S.Ct. at 981, "persons" within the meaning of the fifth amendment included all "persons who have a valid claim over which our federal courts have jurisdiction." *Bali,* 684 F.2d at 1308 n. 6. To the extent that Congress gave these nonresident aliens the right to sue in our courts for torts committed by Americans, the aliens should have standing to object to statutes that deprive them of their damages. Further, the alleged constitutional violations, the application of the Warsaw Convention's liability limits to their claims, occurred in the United States, not abroad. Finally, while acknowledging that "there are undoubtedly constitutional provisions the protection of which nonresident aliens may not claim," we held that where a treaty such as the Warsaw Convention applies generally on its face to both residents and nonresidents of the United States, the fifth amendment would not permit "the application of different rules of decision to residents and nonresidents suing on the same cause of

action in the same court." *Id.* (citation omitted). *Bali,* then, has no bearing on the question whether a nonresident alien under criminal prosecution in the United States may invoke the fourth amendment's exclusionary rule to seek suppression of evidence seized from his residence abroad.

III

Having concluded that the fourth amendment does not apply to the search of Verdugo's residence, I next inquire whether the exclusion of the evidence seized in this case can be justified on some other ground. Application of the exclusionary rule, after all, presupposes a fourth amendment violation. *United States v. Benevento,* 836 F.2d 60, 69 (2d Cir.1987) (because the fourth amendment does not apply to routine border searches, neither does the exclusionary rule); *United States v. Dominguez,* 604 F.2d 304, 312 (4th Cir.1979), *cert. denied,* 444 U.S. 1014, 100 S.Ct. 664, 62 L.Ed.2d 644 (1980). The district court's decision suggests two possible alternative bases for suppressing the evidence in this case. The first basis is suggested in *Toscanino,* 500 F.2d at 286, which held that "aliens who are the victims of unconstitutional action abroad" may invoke the protections of the Bill of Rights to prevent the government from "exploit[ing] the fruits of its unlawful conduct in a criminal proceeding against the alien in the United States." Second, the district court's opinion suggests that courts possess inherent power to require that foreign searches conform to the requirements of the fourth amendment. I will address these two theories in turn.

A.

In *Toscanino,* the Second Circuit suggested that a nonresident foreign national could invoke the fourth amendment to protest the seizure of evidence by United States agents abroad. 500 F.2d at 280-81. The district court, relying on *Toscanino,* stated "[i]t seems unlikely that the Fourth Amendment was not intended to protect an alien, already in the custody of the United States and charged in a criminal complaint, from searches of his foreign residences conducted by United States agents for the express purpose of obtaining evidence relevant to the pending prosecution." To the extent that *Toscanino* rests on the proposition that aliens in Verdugo's position may seek suppression of evidence seized abroad under the fourth amendment, I reject its conclusion. The majority in *Toscanino* cited no authority, nor did it provide any sound reasoning, for its expansive holding. The majority merely concluded, without explanation, that because United States citizens were protected by the fourth amendment abroad, and because aliens in the United States are protected by the fourth amendment within our borders, that "no sound reason" justified a different rule for nonresident aliens. *Id.* This is the same logical fallacy to which the majority in the instant case falls prey. As I stated earlier, I believe that sound reasons exist to distinguish between a *foreign* search of property belonging to a nonresident alien and a *domestic* search of property belonging to any alien or a foreign search of property belonging to an American citizen.

However, as Judge Anderson pointed out in his concurrence, the majority in *Toscanino* could have reached its result on due process grounds, without deciding the question whether the Bill of Rights has extraterritorial application to foreign nationals. *Id.* at 281. *Toscanino* presented

a unique fact situation. Toscanino, an Italian citizen, alleged that he was kidnapped from his home in Uruguay, tortured, and illegally brought within the territorial jurisdiction of the United States and that, prior to his abduction, American officials had unlawfully gathered evidence against him through electronic surveillance of his telephone. *Id.* at 268. He not only challenged the introduction of the evidence seized in Uruguay, but also the power of the district court to assert jurisdiction over his person. Confronting the Second Circuit was a long line of authority first announced in *Ker v. Illinois,* 119 U.S. 436, 7 S.Ct. 225, 30 L.Ed. 421 (1886), and unequivocally reaffirmed in *Frisbie v. Collins,* 342 U.S. 519, 72 S.Ct. 509, 96 L.Ed. 541 (1952), holding that the district court's power to try a person for a crime was not vitiated by the fact that he was brought within its jurisdiction by "forcible abduction." 500 F.2d at 271-72. The Second Circuit, however, argued that since *Frisbie,* the Supreme Court had expanded the fifth amendment's guarantee of due process "to bar the government from realizing directly the fruits of its own deliberate and unnecessary lawlessness in bringing the accused to trial." *Id.* at 272. Citing *Rochin v. California,* 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183 (1952) (*Rochin*), the Second Circuit recognized that "the Supreme Court broadened its interpretation of due process to set aside for the first time a state court conviction resting on evidence obtained through police brutality." *Toscanino,* 500 F.2d at 273.

Indeed, the Court in *Rochin* held that the due process clause required it to determine from "the whole course of the proceedings . . . whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses." 342 U.S. at 169, 72 S.Ct. at 208. The Court was careful, however, to clarify that the

conduct involved in that case offended more than "some fastidious squeamishness or private sentimentalism about combatting crime too categorically." *Id.* at 172, 72 S.Ct. at 209. Rather, it was conduct that "shocks the conscience." *Id.* Subsequently, relying on *Rochin*, the Court in *United States v. Russell,* 411 U.S. 423, 93 S.Ct. 1637, 36 L.Ed.2d 366 (1973), suggested in dictum that while certain law enforcement practices may not violate the Constitution or federal law, they may be "so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction." *Id.* at 431-32, 93 S.Ct. at 1643.

But the reasoning that underlies *Rochin* and its progeny stems not from the fourth but the fifth amendment. Analyzed under the fifth amendment, *Toscanino* could be harmonized with other precedent. *See* 500 F.2d at 281 (Anderson, J., concurring in the result). Toscanino alleged circumstances surrounding the seizure of his person and delivery into the court's jurisdiction which would offend the sensibilities of any civilized person. He was allegedly taken blindfolded and at gunpoint to Brazil and held captive for three weeks of interrogation while being subjected to inhumane forms of physical torture by United States officials. *Id.* at 269-70. According to Toscanino,

> his captors denied him sleep and all forms of nourishment for days at a time. Nourishment was provided intravenously in a manner precisely equal to an amount necessary to keep him alive. Reminiscent of the horror stories told by our military men who returned from Korea and China, Toscanino was forced to walk up and down a hallway for seven or eight hours at a time. When he could no longer stand he was kicked and beaten but all in a manner contrived to punish without scarring. When he would not

> answer, his fingers were pinched with metal pliers. Alcohol was flushed into his eyes and nose and other fluids . . . were forced up his anal passage. Incredibly, these agents of the United States government attached electrodes to Toscanino's earlobes, toes, and genitals. Jarring jolts of electricity were shot throughout his body, rendering him unconscious for indeterminate periods of time but again leaving no physical scars.

Id. at 270.

Despite the truly revolting circumstances that were alleged in *Toscanino,* its due process holding is of doubtful validity. To the extent that *Toscanino* was based on the Second Circuit's belief that the *Ker-Frisbie* doctrine may no longer be good law, its rationale has been substantially undermined by subsequent Supreme Court decisions that have wholeheartedly and repeatedly reaffirmed the *Ker-Frisbie* rule. *See, e.g., Lopez-Mendoza,* 468 U.S. at 1039-40, 104 S.Ct. at 3483-84; *United States v. Crews,* 445 U.S. 463, 474, 100 S.Ct. 1244, 1251, 63 L.Ed.2d 537 (1980); *id.* at 477-79, 100 S.Ct. at 1253-54 (Powell, J., concurring in part) (White, J., concurring in result) (majority of court reaffirming *Frisbie*); *Stone v. Powell,* 428 U.S. 465, 485, 96 S.Ct. 3037, 3048, 49 L.Ed.2d 1067 (1976) (*Stone*); *Gerstein v. Pugh,* 420 U.S. 103, 119, 95 S.Ct. 854, 865, 43 L.Ed.2d 54 (1975). Indeed, the majority acknowledges that in a case following *Toscanino,* the Second Circuit clarified that its due process holding in *Toscanino* was largely impelled by the outrageous acts of kidnap and torture conducted by United States agents. *See United States ex rel. Lujan v. Gengler,* 510 F.2d 62, 65-66 (2d Cir.) (*Gengler*), *cert. denied,* 421 U.S. 1001, 95 S.Ct. 2400, 44 L.Ed.2d 668 (1975). Although it was not confronted with a fourth amendment issue in that case, the Second Circuit

in *Gengler* held that absent "the use of torture, brutality and similar outrageous conduct" condemned in *Toscanino,* the district court was not required to divest itself of jurisdiction over a person who was forcibly abducted in Bolivia and brought into the United States. *Id.* at 68.

By maintaining that the fourth amendment, and hence its exclusionary rule, does not apply to searches of foreign nationals on foreign soil by United States agents, I do not suggest that a federal court can never exclude from a criminal proceeding evidence obtained abroad against an alien by United States officers. To the extent that *Toscanino* recognized that aliens may invoke the fifth amendment to challenge the admission of evidence that was obtained through means that "shock the conscience," I find the case unobjectionable. This rule is consistent with those cases suggesting that the fifth amendment applies to anyone, citizen and alien alike, subject to criminal prosecution in the United States. *Wong Wing,* 163 U.S. at 238, 16 S.Ct. at 981. We have previously speculated that such a "shock-the-conscience" test might apply to an extraterritorial search of an American citizen in a proper case. *See Stonehill v. United States,* 405 F.2d 738, 745 (9th Cir.1968) (*Stonehill*), *cert. denied,* 395 U.S. 960, 89 S.Ct. 2102, 23 L.Ed.2d 747 (1969).

Whether this court should embrace such a due process "shock-the-conscience" test, however, is not a question that needs to be reached in this case. For even if this court were to adopt that test, the conduct of the DEA agents in searching Verdugo's residence is simply not comparable to the official acts of torture, brutality, or other outrageous invasions of a defendent's bodily security that were present in those cases where police conduct was found to "shock the conscience." *See, e.g., Rochin,* 342 U.S. 165, 166, 72 S.Ct. 205, 206 (evidence seized by forcing emetic solution into his stomach to induce vomiting); *Irvine v. California,*

347 U.S. 128, 133, 74 S.Ct. 381, 383, 98 L.Ed. 561 (1954) (suggesting that "shock-the-conscience" test applies only to cases of violence and brutality comparable to *Rochin*); *United States v. Mount,* 757 F.2d 1315, 1323 & n. 6 (D.C. Cir.1985) (Bork, J., concurring) (declining to exclude, on grounds that it "shocks the conscience," evidence seized abroad in an allegedly improper search); *Stonehill,* 405 F.2d at 745 (refusing to apply due process "shocks-the-conscience" test to raid of defendant's business premises by Philippine authorities). Indeed, Verdugo does not appeal the district court's ruling that its jurisdiction over him is not barred by the manner in which the government obtained his custody. Exclusion of the drug tally sheets seized in this case is therefore not warranted by any possible due process concerns.

Because Verdugo does not challenge the district court's adverse ruling on its jurisdiction over him, the majority's discussion of the circumstances of his arrest by Mexican police and transport across the border into United States custody is both irrelevant and gratuitous. Such circumstances are not pertinent to the fourth amendment issue and, therefore, should have played no role in the majority's decision.

B.

Finally, I will discuss whether the district court possessed inherent supervisory power to suppress the evidence seized by the DEA in this case. The district court concluded that it possessed the inherent power to require that extraterritorial searches conform to the warrant and reasonableness requirements of the fourth amendment for the purpose of ensuring proper police action abroad.

However laudable a policy this may be, a federal judge is without power to exclude evidence merely because he or

she disapproves of the particular conduct of governmental agents. In the absence of a constitutional violation, there is simply no authority to justify excluding the evidence in this case. I reject the suggestion that under vaguely-defined "inherent power" or "supervisory power," courts can devise exclusionary rules either to deter misconduct that falls short of violating the Constitution or to preserve "judicial integrity." Although it is clear that the prime purpose of the exclusionary rule is to deter police misconduct, *Janis*, 428 U.S. at 446, 96 S.Ct. at 3028, it is not designed to deter all misconduct. Rather, it is aimed at deterring only misconduct *that violates the fourth amendment. See id.* (the exclusionary rule "is a judicially created remedy designed to safeguard Fourth Amendment rights . . ."); *Calandra,* 414 U.S. at 348, 94 S.Ct. at 620 (same); *see also United States v. Payner,* 447 U.S. 727, 733, 100 S.Ct. 2439, 2445, 65 L.Ed.2d 468 (1980) (*Payner*) (rejecting proposition "that a federal court should use its supervisory power to suppress evidence tainted by gross illegalities that did not infringe the defendant's constitutional rights").

In *United States v. Gatto,* 763 F.2d 1040 (9th Cir.1985) (*Gatto*), we recognized that "a court may not exercise any supervisory power absent 'a clear basis in fact and law for doing so.' " *Id.* at 1046, *quoting United States v. Chanen,* 549 F.2d 1306, 1313 (9th Cir.), *cert. denied,* 434 U.S. 825, 98 S.Ct. 72, 54 L.Ed.2d 83 (1977). That we might disapprove of the manner in which government agents conduct their searches does not, in itself, beckon our intervention. *See Gatto,* 763 F.2d at 1046. While I recognize that there are statements in a number of opinions suggesting that the exclusionary rule exists not only to vindicate a defendant's constitutional rights, but also to protect the integrity of the court, *see, e.g., Payner,* 447 U.S. at 735-36 n. 8, 100 S.Ct. at 2446-47 n. 8; *Mapp v. Ohio,* 367 U.S. 643, 660, 81 S.Ct. 1684, 1694, 6 L.Ed.2d 1081 (1961);

Elkins v. United States, 364 U.S. 206, 222-23, 80 S.Ct. 1437, 1446-47, 4 L.Ed.2d 1669 (1960) (*Elkins*), our cases have cautioned that "[j]udicial integrity is rarely threatened significantly when executive action does not violate the Constitution, a federal statute, or a procedural rule." *Gatto,* 763 F.2d at 1046. Indeed, the Supreme Court has clarified that "[t]he primary meaning of 'judicial integrity' in the context of evidentiary rules is that the courts must not commit or encourage violations of the Constitution." *Janis,* 428 U.S. at 458-59 n. 35, 96 S.Ct. at 3034 n. 35; *see also Elkins,* 364 U.S. at 223, 80 S.Ct. at 1447 (federal courts should not be accomplices in willful violations of the Constitution). Hence, "[w]hile courts, of course, must ever be concerned with preserving the integrity of the judicial process, this concern has limited force as a justification for the exclusion of highly probative evidence." *Stone,* 428 U.S. at 485, 96 S.Ct. at 3048.

Our concern with "overzealous law enforcement" does not, absent a finding of a constitutional or statutory violation by government officers, give courts a " 'chancellor's foot' veto over law enforcement practices" of which we happen to disapprove. *Gatto,* 763 F.2d at 1046. Contrary to allowing us to impose our conceptions of ideal conduct on our law enforcement officials, the Supreme Court has commanded us to weigh the exclusion of evidence "against" the considerable harm that would flow from indiscriminate application of an exclusionary rule." *Payner,* 447 U.S. at 734, 100 S.Ct. at 2445. Application of the exclusionary rule excludes probative evidence, and "exacts a costly toll upon the ability of courts to ascertain the truth in a criminal case." *Id.* Hence, the Court has "consistently recognized that unbending application of the exclusionary sanction to enforce ideals of government rectitude would impede unacceptably the truth-finding functions of judge

and jury." *Id.*; *accord Leon,* 468 U.S. at 907, 104 S.Ct. at 3412; *see also Calandra,* 414 U.S. at 348, 94 S.Ct. at 620.

Congress, I believe, has endorsed this view that the lower federal courts are not at liberty to devise exclusionary rules in order to enforce abstract standards of police conduct. In Fed.R.Evid. 402, Congress has declared that "[a]ll relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, Act of Congress, by these rules [of evidence], or by other rules prescribed by the Supreme Court pursuant to statutory authority."

In view of these considerations, the Supreme Court has refused to allow lower courts to invoke their supervisory or inherent powers to fashion exclusionary rules where established fourth amendment doctrine would not require exclusion of the evidence. *See Payner,* 447 U.S. at 735-36 & n. 8, 100 S.Ct. at 2446 & n. 8. The Court has itself been unwilling to expand the scope of the exclusionary rule, even where the fourth amendment clearly applies and has been violated. *See Stone,* 428 U.S. at 485-86, 96 S.Ct. at 3048. Thus, in its more recent cases, the Court has embraced the primacy of the deterrence rationale for the exclusionary rule, rejecting separate considerations of judicial integrity. *Janis,* 428 U.S. at 446, 96 S.Ct. at 3028 (Deterrence is "the 'prime purpose' of the [exclusionary] rule, if not the sole one."). "Judicial integrity clearly does not mean that the courts must never admit evidence obtained in violation of the fourth amendment." *Id.* at 458 n. 35, 96 S.Ct. at 3034 n. 35. Thus, the Court has established doctrines such as the "good-faith exception" to the exclusionary rule, *see Leon,* 468 U.S. at 908-13, 104 S.Ct. at 3412-15, and the concept that one has no standing to suppress evidence obtained in violation of another's fourth amendment rights. *Alderman v. United States,* 394 U.S. 165, 174, 89 S.Ct. 961, 966, 22 L.Ed.2d 176 (1969). If the

Court has refused to apply the exclusionary rule in many cases in which the fourth amendment has been violated, *a fortiori,* neither we nor the district courts are at liberty to impose the rule where no constitutional violation has occurred.

In the case before us, the drug tally sheets seized by the DEA agents are clearly relevant and probative evidence. We can override the "general need for untrammeled disclosure of competent and relevant evidence" only if we can find sufficiently countervailing considerations. *See Elkins,* 364 U.S. at 216, 80 S.Ct. at 1443. In light of my conclusions that the fourth amendment does not apply in this case and that judges are not at liberty to impose an exclusionary rule to enforce their private notions of how our constables should comport themselves, I can find no basis for the suppression in this case.

My conclusion that we are without authority in this case to fashion a new exclusionary rule is reinforced by separation-of-powers concerns that arise whenever courts seek to control the actions of the executive branch abroad. In *Gatto,* we recognized that:

> A federal court that imposes sanctions on executive conduct that is otherwise permitted by the Constitution, a federal statute or a rule will most likely be invading the executive sphere rather than protecting itself from invasion. Similarly, the separation-of-powers principle suggests that the creation of a rule by supervisory power can be justified only when a recognized [federal] right has been violated.

763 F.2d at 1046. In the present case, any attempt on our part to create a new exclusionary rule would be doubly offensive to principles of separation-of-powers, because we would be attempting to direct the actions of United States executive officials abroad with regard to the citizens of a

foreign sovereign. The Executive Branch has plenary authority over foreign relations. *See United States ex rel. Knauff v. Shaughnessy,* 338 U.S. 537, 542, 70 S.Ct. 309, 312, 94 L.Ed. 317 (1950). Few matters are more peculiarly within the jurisdiction of the executive branch of government than the relations between our agents in a foreign country with citizens of that country. The Supreme Court has repeatedly affirmed that "[f]or reasons long recognized as valid, the responsibility for regulating the relationship between the United States and our alien visitors has been committed to the political branches of our government. Since decisions in these matters may implicate our relations with foreign powers, . . . such decisions are frequently of a character more appropriate to either the Legislature or the Executive than to the Judiciary." *Mathews,* 426 U.S. at 81, 96 S.Ct. at 1892.

If relations between the United States and its alien visitors is a matter for the political branches of government, then *a fortiori* the executive's decisions as to how United States agents abroad should treat the citizens of another sovereignty is a matter beyond the judicial competence. This is an area which by its very nature implicates the executive's diplomatic machinery. "[A]ny policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference." *Harisiades v. Shaughnessy,* 342 U.S. 580, 588-89, 72 S.Ct. 512, 519, 96 L.Ed. 586 (1952); *accord Kleindienst v. Mandel,* 408 U.S. 753, 765-67, 92 S.Ct. 2576, 2582-84, 33 L.Ed.2d 683 (1972). No doubt foreign sovereigns, like our own government, are concerned about the treatment of their subjects by agents of another country. Violations of the interests of their citizens by United States agents could certainly affect our diplomatic ties. Safeguarding the interests of foreign citizens in their own country is, however, a responsibility that must ultimately fall on their own government, not our courts.

Moreover, the ability of United States agents in a foreign country to take any action against a citizen of that country often depends, in large part, on the authorization and cooperation of the foreign government. Whether we can obtain such authorization and cooperation depends on our diplomatic relationship with that country. When United States agents act abroad, they act at the pleasure of the host government. As guests acting under another's auspices, they are hardly in a position to demand that a foreign government recognize the force of our Constitution in its own land with respect to its own people. United States agents must conduct themselves as the officials of the host government see fit. To fashion an exclusionary rule in this case would unduly tie the hands of the executive branch in its dealings with foreign nations regarding actions taken with respect to those nation's citizens. *See Toscanino,* 500 F.2d at 281 (Anderson, J., concurring in result).

The separation-of-powers concerns that counsel against creating an exclusionary rule with respect to actions taken abroad by our officials against foreign nationals applies with equal force to the majority's imposition of a warrant requirement in this case. Although the majority recognizes that "a warrant issued by an American magistrate would be a dead letter in Mexico," and that "it would be an affront to a foreign country's sovereignty if the DEA presented an American warrant," maj. op. at 1230, the majority nevertheless proceeds to require a warrant in this case. I find this result very troubling.

First, by imposing a warrant requirement for extraterritorial searches, the majority opinion conflicts with our implicit holding in *Peterson,* 812 F.2d at 490-92, that a warrant is not required before our agents can conduct an extraterritorial search. In *Peterson,* after concluding that Philippine law enforcement officials were part of a "joint venture" with DEA agents to investigate an international drug-smuggling operation, *id.* at 490, we held that, even if a wiretap conducted in the Philippines by the joint venture were illegal under Philippine law, our DEA agents were entitled to rely in good faith on the assurances of Philippine officials that the wiretap complied with Philippine law. *Id.* at 492. No mention is made in the opinion that the DEA obtained a United States warrant before conducting the wiretap; instead, the opinion suggests that the lawfulness of the search under the fourth amendment turned solely on the question of its "reasonableness." *Id.* at 491 ("local law of the Philippines governs whether the search was reasonable"). The majority in this case attempts to gloss over this essential fact by diverting our attention to a second warrantless search of a vessel on the high seas that was justified by exigent circumstances. *Id.* at 494. However, that search formed the basis for only one of the defendants' evidentiary objections in *Peterson.* The defendants' first contention was that "discovery of the ship and its contraband [was] tainted by unlawful wiretaps participated in by United States officials." *Id.* at 489. If a warrant were required to conduct the foreign wiretap search in *Peterson,* then we would have suppressed the evidence obtained through the illegal wiretap and all of its fruits, including the marijuana subsequently seized in the search of the vessel, whose identity to the DEA was known only as a result of the wiretap. *Id.* at 488-89. Hence, the majority's requirement of a warrant to conduct a foreign search in

this case squarely conflicts with *Peterson*'s implicit holding that a warrant is not required in such cases.

By imposing a warrant requirement in foreign searches, the majority creates numerous other problems of both constitutional and pragmatic dimensions. In authorizing American magistrates to issue still-born search warrants, the majority has written a prescription for advisory opinions, in violation of Article III. Moreover, insofar as the majority's decision allows the judiciary to control the actions of our agents in foreign territory—a matter that is quintessentially the province of the executive branch—the extraterritorial warrant requirement breaches the separation-of-powers between the judicial and executive branches of our government. Finally, the majority's ruling ignores the practical realities that when our agents conduct searches abroad, they are at the mercy of foreign officials. The foreign officials are the ones who decide the scope and reasonableness of any proposed search, whether the search will occur at all, and under what conditions it will be conducted. Even if, in a given case, these foreign officials defer considerably to the requests of our own agents, the fact remains that our agents are conducting the search at the pleasure and under the terms imposed by our foreign hosts.

Needless to say, I do not suggest that we should license United States agents engaged abroad in a criminal investigation to act indiscriminately against foreign nationals. In cases in which our agents obtained evidence by means so outrageous and indecent as to "shock the conscience," such as through torture, due process might require exclusion of such evidence in a criminal proceeding brought against the foreign national in the United States. This is not such a case.

IV

My analysis of the text and history of the Constitution as well as Supreme Court precedent convinces me that a nonresident foreign national in custody in the United States pending criminal prosecution cannot invoke the fourth amendment's protections against a search of his foreign residence by United States officers. In the absence of a fourth amendment violation, I see no basis for holding that the district court possess the inherent power to exclude the evidence seized by United States officers. The majority's ill-advised and unprecedented warrant requirement is diametrically opposed to fourth amendment jurisprudence. Moreover, I believe that, even if the fifth amendment required exclusion of evidence obtained by means that "shock the conscience," admission of the evidence seized in this case would not violate Verdugo's due process rights at trial.

I would hold, therefore, that it was error for the district court to have suppressed the evidence of the drug tally sheets seized by the DEA agents in Mexico.

I respectfully dissent.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

Case No. 86-0107-JLI-Crim.

UNITED STATES OF AMERICA, PLAINTIFF

v.

RENE MARTIN VERDUGO-URQUIDEZ (1), DEFENDANTS

MEMORANDUM DECISION AND ORDER

[Filed Feb. 5, 1987]

The court heard evidence relevant to the motion to suppress filed by defendant Rene Martin Verdugo Urquidez on October 23, November 21, and November 26, 1986. At the evidentiary hearing, Michael Pancer, Patrick Hall, and Eugene G. Iredale appeared on behalf of Verdugo. Assistant U.S. Attorney Warren P. Reese appeared on behalf of the government. Because it raises issues yet to be addressed by the Ninth Circuit which concern the application of the Fourth Amendment to foreign searches, the court submitted the motion in order to set forth in writing its ruling and underlying reasoning. The court has considered the papers filed in support of and in opposition to the motion, the testimony and exhibits offered during the evidentiary hearing, and the oral argument of counsel, and now issues the following memorandum decision and order.

I. FINDINGS OF FACT

On the basis of a complaint charging Verdugo with various narcotics-related offenses, the government ob-

tained, on August 3, 1985, a warrant for his arrest. On Friday, January 24, 1986, United States Marshal's deputies arrested Verdugo near Calexico, California, pursuant to the outstanding arrest warrant. The Marshal's deputies subsequently transferred custody of Verdugo to agents from the Calexico field office of the Drug Enforcement Administration (DEA). After obtaining biographical information from Verdugo, DEA agents transported him, by aircraft, to the Metropolitan Correctional Center in San Diego.

After Verdugo's arrest, Terry Bowen, the Resident Agent in Charge of the DEA office in Calexico, decided to arrange for searches of two residences, located in Mexicali and San Felipe, Baja California. Based upon his own surveillance, reports prepared by other DEA agents, and reports from confidential informants, Bowen believed that the house in Mexicali was Verdugo's principal residence. While Bowen had never personally observed the house in San Felipe, reports from confidential informants indicated that it too belonged to Verdugo. Bowen believed that searches of these residences would disclose cash proceeds from Verdugo's alleged narcotics transactions, as well as documentary evidence of such transactions, including drug ledgers and telephone and address books identifying trafficking associates. Bowen also knew Verdugo to be a suspect in the investigation of the kidnap and murder of DEA Special Agent Enrique Camarena Salazar, and intended to seize any evidence relevant to that investigation which the searches disclosed.

At the time of his decision to conduct the searches of Verdugo's residences, Bowen had been a federal law enforcement officer for eighteen years and had participated in "hundreds" of searches in Mexico. In approximately 10 to 15 per cent of these searches, Bowen himself had seized

evidence for subsequent use by a United States law enforcement agency. To his knowledge, however, such seized evidence had never been actually admitted as evidence in a United States court during a criminal prosecution. His express objective in conducting the immediate searches was to obtain evidence for use against Verdugo in the pending United States prosecution. Despite his inexperience with the use of such foreign seized evidence in a United States prosecution, Bowen did not discuss the searches with anyone prior to making his decision. Bowen alone made the decision to conduct the searches.

Bowen telephoned Walter White, the Assistant Special Agent in Charge of the DEA office in Mexico City. White's duties included overseeing DEA enforcement operations within the Republic of Mexico; he also supervised the five resident DEA offices located within the Republic of Mexico. Bowen informed White of Verdugo's arrest, and stated that he would like to search Verdugo's two Baja residences for documentary evidence of Verdugo's alleged narcotics trafficking activities. Bowen asked White to contact Florentino Ventura, the Director General of the Mexican Federal Judicial Police (MFJP), and ask Ventura to authorize the searches and instruct the local MFJP comandante in Mexicali to cooperate with and assist the DEA agents during the searches. White was aware, and Bowen reminded him during their telephone conversation, that Verdugo was a suspect in the Camarena investigation. White did not ask Bowen whether he had obtained permission from the Department of Justice for the searches and indicated that such permission was not a matter he was concerned with.

After his conversation with Bowen, White telephoned a Mr. Ortega Padilla, the Second Deputy Attorney General for the Republic of Mexico, but was unable to reach him.

White then telephoned Director Ventura, but was also unable to reach him. Because it was now late in the evening on January 24, White decided to wait until the next morning to continue his efforts to obtain authorization for the searches, and made no further telephone calls.

The following morning, White again telephoned Ortega Padilla's office. Unable to reach him at his office, White then telephoned Ortega Padilla's residence and learned that the Deputy Attorney General was away for the weekend. White telephoned Ventura, who was in, and informed him that Verdugo had been arrested near Calexico by United States law enforcement officers. He told Ventura that DEA agents in Calexico believed that Verdugo's Baja residences contained relevant documentary evidence, and that they wanted permission to search the residences. Ventura authorized the searches, and said that Bowen should tell the MFJP comandante in Mexicali that the searches had been authorized and that the local MFJP officers were to cooperate with and assist the United States agents. White then telephoned Bowen, and informed him that Ventura had given permission for the searches.

While waiting for White's return call, Bowen had notified DEA Special Agents Ricardo Ramos, Robert Martinez, and Michael O'Brien that Verdugo had been arrested and that the agents might be needed to conduct a search of Verdugo's residences in Mexico. Bowen told the agents that should the searches occur, they were to seize documentary evidence relevant to Verdugo's alleged narcotics trafficking activities. The agents were already aware that Verdugo was a suspect in the Camarena murder and understood that they were also to seize any documentary evidence relevant to that investigation.

Bowen received White's return telephone call at approximately 1:00 or 1:30 p.m. on January 25. Bowen and the

three DEA agents then drove, in two DEA vehicles, to the MFJP office in Mexicali. Prior to leaving the DEA office in Calexico, Bowen did not contact the United States Attorney's Office in San Diego or the Department of Justice in Washington, D.C. in order to obtain authorization for the searches or to seek advice as to their legality. In Mexicali, Bowen informed MFJP Comandante Enrique Salazar-Ramos that Verdugo had been arrested near Calexico, that the DEA believed his residences in Mexicali and San Felipe contained documentary evidence of his alleged narcotics trafficking activities, and that MFJP Director General Ventura had authorized searches of the two residences and stated that the local MFJP officers were to assist the DEA agents in conducting the searches. Bowen did not mention to Salazar that Verdugo was also a suspect in the Camarena investigation. Salazar said that he would have to verify Bowen's statements and, in the presence of the DEA agents, placed a telephone call. The DEA agents overheard Salazar speaking with another individual over the telephone. After he finished the conversation, Salazar said that "everything was fine," but that he wanted to speak with the "Delegado" before conducting the searches. Salazar then left the MFJP office. When he returned a few minutes later, Salazar again said that everything was fine and indicated that the searches would occur. DEA Agent Ramos, who is licensed as an attorney in Mexico, testified that a delegado is a Mexican attorney who functions as the local representative of the Mexican Attorney General, and that his duties include supervising the local MFJP officers. Ramos also testified that the office of the Mexicali Delegado is in the same building as the office of the MFJP.

Salazar assembled approximately 10 to 15 MFJP officers to conduct the searches, and instructed some of the

MFJP officers to ride with the DEA agents in their vehicles. Prior to leaving for Verdugo's residences, Salazar informed Bowen that the DEA would be permitted to take any documentary items believed to be evidence back to the United States. The DEA-MFJP group then drove to the Mexicali residence believed to belong to Verdugo, arriving there after dark. Upon arriving at the residence, several MFJP officers were stationed around the perimeter of the residence. The DEA agents remained in the street while Salazar, accompanied by an entry team comprised entirely of MFJP officers, approached the front door. Salazar knocked on the door, and when no one answered, he or one of the MFJP officers with him broke a pane of glass in the door, reached in, and unlocked the door from the inside. As Salazar entered the house, he turned and waved approximately eight MFJP officers and the DEA agents into the house.

Once inside, the MFJP officers conducted a security sweep to determine whether anyone was in the house. While the DEA agents did not actively participate in the sweep, they apparently wandered throughout the house. Agent Martinez observed MFJP officers opening drawers and closets during the security sweep. None of the DEA agents, however, participated in any search of the residence at this time. Salazar and Bowen, meanwhile, were discussing how to proceed with the search. Because it was already dark, and because it was approximately a two hour drive to San Felipe, Salazar decided to leave four or five MFJP officers at the Mexicali residence to secure it, and proceed immediately to San Felipe with the DEA agents and remaining MFJP officers. Salazar instructed the MFJP officers who remained at the Mexicali residence that they were not to search the residence until he and the DEA agents returned.

The group arrived in San Felipe in the evening after nightfall. Using a map of the town, Bowen directed the group to a residence which, based upon informants' reports, he believed belonged to Verdugo. The DEA agents and the majority of the MFJP officers remained at the perimeter of the house while Salazar and two of his MFJP officers approached the front door. Salazar knocked on the door and was admitted by the occupants. Thereafter, Bowen, Ramos, Martinez, and a number of the MFJP officers formerly stationed on the perimeter of the property entered the house as well. Inside the house were some women—the testimony of the DEA agents differed as to whether there were two or three or four. In response to Salazar's questions, one of the women, later identified as Yolanda Tafoya, denied that the house belonged to Verdugo or that she even knew Verdugo. One of the MFJP officers spotted a letter or other piece of paper bearing Verdugo's name on a nearby counter. When confronted with the letter, Tafoya acknowledged that she knew Verdugo and that her husband worked for him. MFJP officers then conducted a brief search, lasting several minutes, of the Tafoya residence. None of the DEA agents participated in this search, and nothing seized by the MFJP officers was turned over to the DEA.

Tafoya's husband Raymundo then arrived at the house and told the officers and agents that Verdugo owned a beach house at Playa del Sol, some two to three miles away. Raymundo Tafoya accompanied the agents and officers as they drove to Playa del Sol, and identified the beach house. The beach house was, in fact, several buildings surrounding a recreational area. The complex was locked, dark, and apparently unoccupied. Tafoya indicated that a caretaker had a key to the complex. Nonetheless, one of the MFJP officers entered one of the

buildings through a window, and then unlocked the front door from the inside. Salazar, "at least two" MFJP officers, and the four DEA agents entered the building and commenced a search of the entire complex. The majority of the MFJP officers remained outside, stationed on the perimeter of the complex as guards.

The search of the Playa del Sol complex lasted approximately two hours. The exact nature of the DEA participation in this search is a little unclear. Agent Ramos' testimony suggests that the MFJP officers alone actually conducted the search, and that the DEA agents simply followed the MFJP officers throughout the complex. The testimony of agents Bowen and Martinez, however, indicates that the DEA agents actively participated in the search itself, both in terms of actually looking for relevant documentary items and identifying as relevant those documentary items discovered by MFJP officers. This court finds that the search occurred as suggested by the testimony of agents Bowen and Martinez.

During the search, items were placed in separate containers according to which agency seized them. The officers and agents completed the search shortly before midnight. All seized documentary items were then put into plastic bags, turned over to the DEA agents, and placed in one of the DEA vehicles. Seized weapons were kept by the MFJP. MFJP officers also seized a 1984 Grand Marquis automobile and some three-wheeled vehicles. No inventory of seized items was prepared by the DEA agents prior to leaving the residence, and they left no receipt or other notice that the residence had been searched and items had been seized.

The officers and agents then returned to Mexicali, arriving at the previously secured residence approximately two hours after leaving San Felipe. The MFJP officers who

had been left at the Mexicali house remained outside the house, acting as guards. The remaining MFJP officers, Salazar, and the four DEA agents entered the house. Again, there is some ambiguity as to the nature and scope of DEA participation in the search. Based primarily upon the testimony of Agents Bowen and Martinez, the court finds that Salazar, "at least two or three" MFJP officers, and three of the four DEA agents conducted a room by room search of the residence for documentary evidence. The DEA agents seized documents they believed were relevant, while documents seized by MFJP officers were shown to Bowen for a decision as to their relevance. The agents and officers placed seized documents in separate containers according to the room from which they had been seized, and these containers were placed in the DEA vehicles. Again, the MFJP kept all seized weapons.

Two hours into the search, at approximately 3:30 or 4:00 a.m., Bowen was searching a cabinet area in the back portion of the house. The cabinets contained several briefcases and folders full of papers. Salazar was seated in a nearby chair as Bowen reviewed documents, differentiating between those that were relevant and those that were not. Salazar got up from his chair, placed all of the remaining documents in a single briefcase, and told Bowen to take all of them and sort them out later. Salazar indicated that it was late, he was tired, and he did not want the search to continue any longer. Bowen placed the briefcase full of papers in one of the DEA vehicles along with the containers of papers previously seized.

The MFJP officers and DEA agents then left the Mexicali residence. The DEA agents returned to the United States with the seized documents. The agents then prepared inventories and the appropriate DEA reports identifying and describing the seized documents. All

documents seized during the searches remain in the custody of the government, and are currently stored in both Calexico and San Diego.

II. DISCUSSION

Verdugo moves to suppress all evidence seized during the searches of his residences in Mexicali and Playa del Sol. He argues that the searches of these residences violated the Fourth Amendment.

A. *General Applicability of the Fourth Amendment*

Neither the Fourth Amendment nor the exclusionary rule apply to foreign searches conducted by foreign officials. *Stonehill v. United States*, 405 F.2d 738, 743 (9th Cir. 1968), *cert. denied*, 395 U.S. 960 (1969); *see Brulay v. United States*, 383 F.2d 345, 348 (9th Cir.), *cert. denied*, 389 U.S. 986 (1967). The rationale underlying this rule is twofold: the Fourth Amendment is directed at the United States government and its agencies and not at foreign governments and agencies, and the exclusion of evidence in a United States prosecution will have little deterrent effect on the conduct of foreign law enforcement officials. *Brulay*, 383 F.2d at 348. An exception to the rule, however, occurs when United States agents substantially participate in a search so as to convert it into a joint venture between United States and foreign officials. When such a joint venture exists, the Fourth Amendment and the exclusionary rule apply. *Stonehill*, 405 F.2d at 743; *cf. United States v. Emery*, 591 F.2d 1266, 1267-1268 (9th Cir. 1978) (requiring *Miranda* warnings prior to foreign interrogation conducted as joint venture between United States and foreign officials).

The facts discussed above compel a finding that the immediate searches were conducted as a joint venture be-

tween United States and Mexican law enforcement officials. The DEA agents initiated the searches in order to obtain evidence relevant to a criminal prosecution pending in the United States. The searches were unrelated to any pending or contemplated Mexican criminal prosecution and would not have been conducted by the MFJP absent encouragement from the DEA. Bowen himself testified that the searches were "DEA initiated" and that the MFJP had no independent interest in the searches. Comandante Salazar appeared reluctant to conduct the searches absent approval from Director Ventura, approval which had been previously requested and obtained by the DEA. The DEA agents participated extensively in the searches themselves, both in terms of searching for relevant documents and identifying as relevant documents discovered by MFJP officers. Finally, MFJP officers did not take initial custody of seized documents or otherwise inventory or process them according to MFJP procedures. Instead, the DEA agents took immediate custody of all seized documents and transported them at once to the United States, where they were inventoried and processed according to DEA procedures for use in a DEA investigation. These facts, considered together, indicate an affirmative participation in the planning and execution of the searches far removed from the passive or peripheral role of United States agents in searches where no joint venture was found. *See, e.g., Stonehill*, 405 F.2d at 746; *United States v. Rose*, 570 F.2d 1358, 1362 (9th Cir. 1978); *United States v. Benedict*, 647 F.2d 928, 930-31 (9th Cir.), *cert. denied*, 454 U.S. 1087 (1981).

Verdugo's Mexican citizenship, however, presents an issue apparently not yet addressed by the Ninth Circuit. Reported decisions in this circuit applying the joint venture rule to foreign searches have apparently involved only

foreign searches of United States citizens. *See, e.g., Stonehill,* 405 F.2d at 740; *Rose,* 750 F.2d at 1361; *Benedict,* 647 F.2d at 929. None of the cases cited to or discovered by the court expressly address the situation presented by the immediate case: whether the Fourth Amendment applies to a foreign search of a foreign national conducted as a joint venture by United States and foreign officials.

The extent to which the Constitution protects aliens from our government's conduct abroad is unclear and depends upon whether the interest asserted by the alien is within the intended scope of the constitutional provision upon which he relies. *Cardenas v. Smith,* 733 F.2d 909, 914-917 (D.C. Cir. 1984). The Second Circuit has held that the Fourth Amendment limits the conduct abroad of United States agents which affects foreign nationals. *United States v. Toscanino,* 500 F.2d 267, 280 (2nd Cir. 1974) (Italian citizen may raise Fourth Amendment challenge to legality of Uruguayan wiretap conducted by United States agents); *accord Jean v. Nelson,* 727 F.2d 957, 973 (11th Cir. 1984) (characterizing modern judicial trend as permitting aliens who are victims of unconstitutional government conduct abroad to assert the Constitution if the government seeks to use the fruits of its illegal conduct in a United States criminal prosecution), *aff'd on other grounds,* 105 S.Ct. 2992 (1985). Cases involving Coast Guard searches of vessels outside the territorial waters of the United States have also permitted foreign nationals to raise Fourth Amendment challenges. *United States v. Cortes,* 588 F.2d 106, 110 (5th Cir. 1979) ("once aliens become subject to liability under United States law, they also have a right to benefit from its protection"); *United States v. Demanett,* 629 F.2d 862, 866 (3rd Cir. 1980), *cert. denied,* 450 U.S. 910 (1981); *cf. United States*

v. Rubies, 612 F.2d 397, 404 (9th Cir. 1979) (assuming, but not deciding, that aliens may raise Fourth Amendment challenge to searches of vessels which occur outside territorial waters), *cert. denied,* 446 U.S. 940 (1980). The holdings of the above cases are especially applicable to the immediate searches. It seems unlikely that the Fourth Amendment was not intended to protect an alien, already in the custody of the United States and charged in a criminal complaint, from searches of his foreign residences conducted by United States agents for the express purpose of obtaining evidence relevant to the pending prosecution. Accordingly, the court holds that the Fourth Amendment applies to the searches, conducted as a joint venture between United States and Mexican officers, of Verdugo's residences in Mexicali and Playa del Sol, notwithstanding Verdugo's Mexican citizenship.

B. *Applicability of the Warrant Clause*

The issue that remains is what application of the Fourth Amendment means in the context of these searches. The government concedes that the two immediate searches were without a warrant, Mexican or otherwise, and has demonstrated no exigent circumstances which would ordinarily permit a warrantless search of a residence. The government argues, however, that should the Fourth Amendment apply, it cannot be applied literally to require a warrant. Obtaining a warrant was impracticable, the government contends, since the availability of a Mexican warrant at the time of the searches was "uncertain" and the availability of a United States warrant was and is limited by Fed.R.Crim.P. 41(a), which requires a warrant to be issued in the district in which the property subject to seizure is located.

Article 16 of the Mexican Constitution seems to require, on its face, a warrant similar to that required by the

Fourth Amendment before search of a residence is permissible. The government has not demonstrated that obtaining a warrant pursuant to Article 16 was either impossible or even impracticable. Agent Bowen's testimony that he had never conducted a search with the MFJP where a warrant was obtained does not indicate that a warrant was unnecessary or could not be obtained. Had either Bowen or White contacted the United States Attorney's office in San Diego or the Department of Justice in Washington, D.C., they might have learned that the Fourth Amendment might restrict DEA searches in Mexico. Had they thereafter discussed this problem with Director Ventura or Deputy Attorney General Ortega Padilla, they might have learned that a warrant which complied with the Fourth Amendment could be obtained pursuant to Article 16 even though, as a practical matter, Mexican law enforcement officers seldom felt constrained to do so. This failure to make inquiries, coupled with the government's failure to present any other proof demonstrating that obtaining a Mexican warrant was impossible or impracticable, prevents a finding that a Mexican warrant complying with the Fourth Amendment was in fact unavailable. Absent such a showing, the court is disinclined to restrict application of the warrant clause of the Fourth Amendment because of the "uncertain" availability of a Mexican warrant. *Cf. Toscanino*, 500 F.2d at 280 (where Fourth Amendment applies overseas, that the foreign country which is the site of the search does not afford a procedure for issuance of a warrant does not excuse compliance with the warrant requirement).

With respect to the government's second contention, that a United States warrant was unavailable, Fed.R.Crim.P. 41(a) provides that

> a search warrant authorized by this rule may be issued by a federal magistrate or a judge of a state court of record within the district wherein the property or person subject to seizure is located, upon request of a federal law enforcement officer or an attorney for the government.

Thus, Fed.R.Crim.P. 41(a) does not empower a federal magistrate or a state judge within the Southern District of California to issue a warrant authorizing searches of residences located in Mexico. Several courts have held, however, that whatever limitations Fed.R.Crim.P. 41 as a whole places on the warrant authority of a federal magistrate or state judge, it does not limit the inherent power of a federal court of general jurisdiction to issue warrants which conform to the Fourth Amendment. In *United States v. Torres,* 751 F.2d 875 (7th Cir. 1984), *cert. denied,* 105 S.Ct. 1853 (1985), a district court judge issued a warrant authorizing video surveillance of a residence used by a Puerto Rican terrorist group to manufacture explosives. The Seventh Circuit affirmed the power of the district court to issue such a warrant, despite the fact that Fed.R.Crim.P. 41(b), by its terms, permits a magistrate to issue only warrants authorizing seizure of tangible property and persons. The court derived this power to issue video surveillance warrants from both a "flexible" construction of Fed.R.Crim.P. 41(b) itself, and the inherent power of the district court to issue warrants which conform to the Fourth Amendment. *Id.* at 878-879. Other courts have also used the inherent power theory to justify district court warrants not specifically provided for by Fed.R.Crim.P. 41. *United States v. Biasucci*, 786 F.2d 504, 509 n.6 (2nd Cir.) (following *Torres*), *cert. denied,* 107 S.Ct. 104 (1986); *United States v. Ianniello*, 621 F.Supp. 1455, 1467 (S.D. N.Y. 1985) (following *Torres*); *see United States v. New York Telephone Co.*, 434 U.S. 159, 168 n.14 (1977) (acknowledging, without disapproval, that some courts of appeal [*sic*] had derived authority for judicial orders

authorizing telephone pen registers from an inherent power "closely akin" to Fed.R.Crim.P. 41 which permits issuance of warrants under circumstances conforming to the Fourth Amendment); *United States v. Freitas,* 610 F.Supp. 1560, 1570 (N.D. Cal.1985) (suggesting that inherent power theory would permit district court warrant authorizing surreptitious entry and visual observation of clandestine methamphetamine laboratory), *rev'd on other grounds,* 800 F.2d 1451 (9th Cir. 1986); Fed.R.Crim.P. 57 ("in all cases not provided for by these rules, district judges and magistrates may regulate their practice in a manner not inconsistent with these rules").

Only one reported decision has apparently used the inherent power theory to address the specific problem, created by overseas application of the Fourth Amendment, of the gap between Fed.R.Crim.P. 41(a) and the warrant clause. In *Berlin Democratic Club v. Rumsfeld,* 410 F.Supp. 144 (D.C. 1976), a group of United States dissidents living in West Germany filed a civil action against the Secretary of Defense and other United States officials which alleged various Fourth Amendment causes of action. Plaintiffs claimed that United States military personnel overseas had conducted warrantless electronic surveillance of their political meetings and other activities. Defendants moved to dismiss the complaint, arguing in part that the warrant clause was inapplicable to overseas wiretaps since no United States magistrate was empowered to issue an overseas warrant. The district court acknowledged that Fed.R.Crim.P. 41(a) restricts a magistrate's power to warrants authorizing seizure of persons or property located within his district. The court nonetheless rejected defendants' argument, noting that

> Rule 41(a) cannot limit or restrict the dictates of the Constitution to the United States, . . . particularly

> when the Supreme Court has held those dictates applicable overseas. *Reid v. Covert, supra.* The court's authority over federal officials is sufficient to require an official to present for approval in the United States a warrant for a wiretap overseas.

Id. at 160; *accord United States v. Williams,* 617 F.2d 1063, 1099 (5th Cir. 1980) (en banc) (concurring opinion) (United States courts have inherent power to issue warrants authorizing searches of vessels outside United States territorial waters); *United States v. Egan,* 501 F.Supp. 1252, 1273 (S.D. N.Y. 1980) (same holding as *Williams*). While the court's reference in *Berlin Democratic Club* to its authority over federal officials is somewhat conclusory, it is consistent with other cases, mentioned above, which discuss the theory of a district court's inherent power to issue warrants which conform to Fourth Amendment standards.

The government might argue that implying such a power to issue an overseas warrant is impermissible since it infringes upon the sovereignty of the nation where the search is to occur. The Fourth Amendment's general requirement of reasonableness, however, would certainly require, prior to the execution of any overseas warrant, that the search authorized by the warrant be approved by the appropriate foreign official. Such a procedure, had it been utilized in the immediate case, would have been no more intrusive upon the sovereignty of Mexico than the warrantless search authorized by Ventura after White's informal telephonic request for permission to search.

Based upon the foregoing authority, the court feels that a United States District Court has the inherent power, notwithstanding the limitations placed upon federal magistrates and state judges by Fed.R.Crim.P. 41(a), to issue warrants both authorizing and properly limiting, ac-

cording to constitutional principles, overseas searches. The appropriate district in which to seek such a warrant would include the district having jurisdiction of the criminal offense involved. Thus, the DEA agents involved in the immediate searches could and should have attempted to obtain warrants from the District Court for the Southern District of California prior to conducting searches of Verdugo's residences in Mexicali and Playa del Sol. Since they did not, the immediate searches were unconstitutional warrantless searches of a residence.

The court notes that even if it were to find that Fed.R.Crim.P. 41(a) precludes a United States court from issuing an overseas warrant, compliance with the warrant clause could not, solely because of the unavailability of a warrant, be excused. In the context of a warrantless search, conducted by United States military personnel, of a United States citizen's apartment in post-war occupied Austria, the First Circuit discussed a relevant hypothetical:

> For present purposes we assume, and we think it is probably so, that the protection of the Fourth Amendment extends to United States citizens in foreign countries under occupation by our armed forces. [citations omitted] . . . For example, suppose A, a citizen of the United States, goes to Germany to take employment in a civilian capacity under the High Commissioner. He is suspected of having previously transported stolen goods in interstate commerce, in violation of 18 U.S.C. § 2314. Agents of the F.B.I. without any search warrant, break into A's dwelling in Germany, ransack the place, find and seize the alleged stolen goods. Upon a subsequent prosecution of A in the United States for that offense, it can hardly be doubted that the evidence so obtained would be excluded as the product of a search and seizure forbidden by the Fourth Amendment. And this would be so, even though no judicial officer had been authorized to act on an application for a warrant. Obviously, Congress may not nullify the guarantees of the Fourth Amendment by the simple expedient of not empowering any judicial officer to act on an application for a warrant. If the search is one which would otherwise be unreasonable, and hence in violation of the Fourth Amendment, without the sanction of a search warrant, then in such a case, for lack of a warrant, no search could lawfully be made.

United States v. Best, 184 F.2d 131, 138 (1st Cir. 1950), *cert. denied,* 340 U.S. 939 (1951). In *Best,* the court ultimately held that the Fourth Amendment permitted the warrantless search, given the drastic circumstances of the immediate post-war military occupation of Austria. *Id.* at 138-141. The initial example discussed by the *Best* court, however, remains relevant to foreign searches conducted in the absence of a state of war, and has been cited with approval by the Second Circuit. *Toscanino,* 500 F.2d at 280.

The example discussed in *Best* involved United States conduct abroad which implicated the Fourth Amendment rights of a United States citizen. This case involves United States conduct abroad which implicates the Fourth Amendment rights of an alien. As discussed previously, however, there is no meaningful way to distinguish between overseas application of the Fourth Amendment to a United States citizen and overseas application of the Fourth Amendment to an alien already in the custody of the United States and subject to prosecution under our criminal laws. The Fourth Amendment, which therefore

applies to the immediate searches, requires, prior to the search of a residence, a written warrant or exigent circumstances which excuse the warrant requirement. The government has proferred no exigent circumstances recognized by current Fourth Amendment caselaw which would justify the warrantless searches of Verdugo's residences. The argument that Congress has not expressly authorized any judicial officer to issue the overseas warrant required by the Fourth Amendment cannot, by itself, excuse compliance with the Fourth Amendment. If the government is not empowered to act constitutionally, it simply cannot act. *See Reid v. Covert,* 354 U.S. 1, 6 (1956). To hold otherwise would permit Congress to restrict the Constitution through legislation which, as our history fortunately indicates, places the cart before the horse.

Finally, the government urges in its opposition that should the warrant clause apply, the court should nonetheless refuse to suppress the evidence, applying the good faith exception to the exclusionary rule established by the Supreme Court in *United States v. Leon*, 468 U.S. 897 (1984). The government argues that the exclusionary rule should not apply where United States officers conducting a foreign search follow their foreign counterparts and reasonably believe that they are proceeding lawfully. The Court's holding in *Leon* applies only to searches pursuant to a facially valid warrant later determined to be invalid. *Id.* at 922. As indicated during oral argument, this court will not extend *Leon* to a warrantless search absent clear authority from either the Ninth Circuit or the Supreme Court.

In any event, it is doubtful that the DEA agents' belief in the lawfulness of the searches, whether in good faith or not, can be considered reasonable. Neither Bowen nor

White, the two senior agents involved in the searches thought it necessary to seek either legal advice or legal authorization regarding the searches from the local United States Attorney's Office or the Department of Justice. Had they sought such advice, they would presumably have learned that the searches implicated Verdugo's Fourth Amendment rights and that warrants might be necessary for the searches to be lawful. Bowen's failure to seek this advice, despite his inexperience with the use of foreign-seized evidence in a United States prosecution, and despite the importance of the investigation which provided at lease [*sic*] some of the motivation underlying the searches, renders his belief in the legality of the searches unreasonable under the *Leon* standard.

C. *Reasonableness of the Execution of the Searches*

Even if the court were to accept the government's argument and find noncompliance with the warrant clause excused, the searches nonetheless still violated the Fourth Amendment. An initially valid search may be subsequently invalidated if its execution is unconstitutionally unreasonable. *See United States v. Penn,* 647 F.2d 876, 882-883 (9th Cir. 1980). Whatever the initial lawfulness under the Fourth Amendment of these warrantless foreign searches, several factors compel a finding that the subsequent execution of the searches was unreasonable.

While the initial entry of the Mexicali house occurred during the late afternoon or early evening, the bulk of the searches of both residences occurred between the hours of 10:00 p.m. and 4:00 a.m. The government has demonstrated no specific exigent circumstances which would justify the invasion of privacy which a search during these hours creates. *United States v. Searp,* 586 F.2d 1117, 1122 (6th Cir. 1978) (Fourth Amendment prohibits

nighttime search absent exigent circumstances justifying such a search) *cert. denied*, 440 U.S. 921 (1979); *see United States v. Stefanson*, 648 F.2d 1231, 1236 (9th Cir. 1981) (Fed.R.Crim.P. 41 requires warrant authorizing nighttime execution to be based upon affidavit reciting specific facts justifying nighttime execution).

During the searches, the DEA agents did not prepare contemporaneous inventories of the items seized. They therefore did not leave receipts at the searched residences which would have notified the residents that a search had occurred and that various specified items had been seized as evidence of narcotics trafficking. *See* Fed.R.Crim.P. 41(d) (officer executing warrant issued pursuant to Fed.R.Crim.P. 41 must leave receipt describing property seized at searched residence).

Finally, the searches themselves were unconstitutionally general in their scope. While Bowen himself apparently had a fairly precise idea of the type of documentary evidence he hoped to find, he told his fellow DEA agents and the cooperating MFJP officers only that they were to seize documentary evidence relevant to Verdugo's alleged narcotics trafficking activities. No written descriptions of the precise documentary items sought were prepared or given to either the DEA agents or the MFJP officers. The search proceeded according to Bowen's oral instructions, with the agents and officers seizing any documents that appeared relevant. Such a search through all documents found within a residence, not limited by any precise written or oral descriptions of the type of documentary items sought, constituted an unconstitutional general search.

III. ORDER

Verdugo's motion to suppress evidence seized during the searches of his residences in Mexicali and Playa del Sol is granted.

IT IS SO ORDERED.

DATED: February 5, 1987.

/s/ J. Lawrence Irving

J. LAWRENCE IRVING, JUDGE
United States District Court

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 87-5061

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

VS.

RENE MARTIN VERDUGO-URQUIDEZ, DEFENDANT-APPELLEE

[Filed Nov. 14, 1988]

ORDER

Before WALLACE, NORRIS and THOMPSON, Circuit Judges.

A majority of the panel, as constituted above, has voted to deny the petition for rehearing. Judge Wallace voted to grant the petition for rehearing. The panel has voted unanimously to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for en banc rehearing. Fed. R. App. P. 35(b).

The petition for rehearing is DENIED, and the suggestion for rehearing en banc is REJECTED.

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OPPOSITION

BRIEF

88-1353

Supreme Court, U.S.
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MAR 27 1989
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No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

UNITED STATES OF AMERICA, PETITIONER,

v.

RENE MARTIN VERDUGO-URQUIDEZ

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MICHAEL PANCER, Esq.
625 Broadway, Suite 1135
San Diego, California 92101
Telephone: (619) 236-1826

PATRICK Q. HALL, Esq.
CHARLES L. GOLDBERG, Esq.
303 West "A" Street
San Diego, California 92101
Telephone: (619) 232-6671

Attorneys for Respondent
RENE MARTIN VERDUGO-URQUIDEZ

QUESTIONS PRESENTED

1. Whether the Fourth Amendment requires United States law enforcement officers seeking evidence in connection with a United States criminal prosecution to obtain a warrant prior to searching a briefcase seized the previous day and in the agents' exclusive control in the United States belonging to a foreign national in custody in the United States pursuant to a United States arrest warrant.

2. Whether the search of a foreign national's residence in a foreign country is unreasonable under the Fourth or Fifth Amendment where the search is conceived and initiated by DEA in the United States and executed by DEA agents

in an effort to obtain evidence for the U.S. prosecution of an individual kidnapped from Mexico at the direction of U.S. agents and presently in U.S. custody.

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No.

IN THE SUPREME COURT OF THE UNITED STATES
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UNITED STATES OF AMERICA, PETITIONER,

v.

RENE MARTIN Verdugo-Urquidez

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

OPINION BELOW

The opinion of the Court of Appeals (App., infra, 1a-185a) is reported at 856 F.2d 1214.

JURISDICTION

The judgment of the Court of Appeals was entered on August 29, 1988. A petition for rehearing was denied on November 14, 1988 (App., infra, 186a-236a). On January 4, 1989, Justice O'Connor

extended the time within which to file a peititon for a writ of certiorari to and including February 12, 1989. The jurisdiction of this Court is invoked under Title 28 U.S.C. Section 1254(1).

STATEMENT

I

On January 24, 1986, respondent Verdugo-Urquidez was arrested pursuant to a sealed complaint. Subsequently superseding indictments were returned against him charging him with a series of violations including violating Title 21 U.S.C. Section 848 (engaging in a Continuing Criminal Enterprise), Title 21 U.S.C. Section 963 (conspiracy to import quantities of marijuana), and Title 21 U.S.C. Section 841(a) (possession with intent to distribute quantities of marijuana).(infra 1a-2a.)

Respondent Verdugo-Urquidez initially challenged the District Court's jurisdiction over him because of the manner in which the United States obtained his custody. Subsequently, respondent Verdugo-Urquidez moved the District Court to suppress all evidence obtained as a result of his unlawful arrest and the search of his residences both in Mexicali, Mexico and San Felipe, Mexico. The District Court granted the motion to suppress with respect to evidence obtained from both residences. (infra 68a-118a)

The Government appealed the granting of the suppression motion and the Court of Appeals affirmed that judgment. (infra 1a-67a)

On August 3, 1985, a sealed complaint was filed in the Southern District of California seeking and obtain-

ing a warrant for the arrest of respondent Verdugo-Urquidez for violations of criminal laws of the United States. Unable to execute the warrant in the United States, the DEA confirmed that respondent Verdugo-Urquidez resided in Mexicali, Mexico and contacted the United States Marshals Service to determine whether it would be feasible for Mexican authorities to apprehend Verdugo-Urquidez in Mexico and deliver him to the United States for trial. (infra 6a) In January of 1986, the United States Marshals Service contacted Mexican law enforcement officers who indicated that Mexican officers would arrest Verdugo-Urquidez in Mexico at the request of the United States. The Marshals purportedly showed the Mexican officers the warrant for Verdugo-Urquidez's arrest. (infra 6a-7a) On

April 11, 1986, the District Court made factual findings regarding the circumstances of respondent Verdugo-Urquidez's seizure in Mexico. Over the objection of respondent, the court conducted an in camera interview of witnesses regarding the circumstances of respondent Verdugo-Urquidez's arrest as well as considering sealed affidavits submitted by the government. [ER pages 68-70].[1] At the motion hearing challenging jurisdiction over respondent Verdugo-Urquidez, the District Court made the following findings: On January 24, 1986, while driving his car in San Felipe, Baja California, Mexico, respondent Verdugo-Urquidez was stopped by six Mexican police

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1/ "E.R." refers to Respondent's Excerpt of Record in the Court of Appeals.

officers. (infra 7a) Respondent was then ordered from his car, arrested, handcuffed and placed in the backseat of the Mexican officers' unmarked car. With his hands still cuffed behind his back, the police forced Verdugo-Urquidez to lie face down on the car seat with his face covered by his jacket. The police then proceeded on a two hour drive to the Mexican/American border during which time respondent was continually held on the seat and his head was covered or blindfolded. At no time did the Mexican officers explain to Verdugo-Urquidez where they were going or why he had been arrested.[2] When

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2/ At the motion hearing, Respondent was not permitted to cross-examine witnesses or contest these findings. Respondent argued that he was confronted by

(Fn. continued next page)

the Mexican officers arrived at the border, they removed respondent Verdugo-Urquidez from the car and walked him across the border to where United States Marshals waited. United States Marshals placed respondent under arrest and drove him to the United States Border Patrol station and eventually he was transferred to Metropolitan Correctional Center in San Diego. (infra 8a)

Soon after the kidnapping of respondent Verdugo-Urquidez, a formal accusation was filed by the prosecutor in the State of Baja California, Mexico, charging the six men with kidnapping. These

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2/ Cont.
six armed men, forcibly removed from his car and held down in the back of the other car on the journey to the border. No one identified themselves. The factual findings to the contrary were not adduced as a result of any evidentiary hearing. (E.R. 73-74).

men were subsequently permitted to enter the United States where they were apparently admitted to the Federal Witness Protection Program. (infra 8a)

Once in Calexico, the Marshal's Office phoned DEA resident agent in Calexico, Terry Bowen, who had been waiting for the call informing him of respondent's arrest. Bowen then took custody of Verdugo-Urquidez and initially questioned him at the Calexico office (RT 762-763).[3] There Agent Lionel Lizzaraga of the DEA, prior to advising defendant of his Miranda rights, asked the defendant his name, address, and birth date (RT 760-763). After respondent Verdugo-Urquidez told the agents

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3/ "R.T." refers to the Reporter's Transcript of the Record in this case.

his address, the decision was made approximately two hours later to search respondent Verdugo-Urquidez's residences in Mexicali and San Felipe (RT 763-764). Agent Bowen discussed the prospect of searching respondent's houses in Mexico with the other agents at the Calexico office. Agent Bowen believed that a search of Verdugo-Urquidez's Mexicali residence would disclose cash proceeds from his smuggling operations as well as documentary evidence of those transactions including drug ledgers and phone books listing the names and addresses of his associates. (infra 9a) These discussions occurred while the agents were still in the United States and after respondent Verdugo-Urquidez was secure in the United States.

At approximately 9:00 on the evening of January 24, 1986, Bowen contacted DEA

agent Walter White, a DEA agent stationed in Mexico City. Bowen testified that prior to his contact with the agent in Mexico City, he had not conversed with the local Mexicali commandante, Enrique Salazar, regarding seeking his assistance in conducting a search of the Mexicali residence. According to Bowen, he explained to White that it would be better off if Director General Ventura called Commandante Salazar, based on his prior experience with certain commandantes and having requests coming directly from Mexico City. (RT 425) White contradicted Bowen testifying that Bowen expressed to him that he had discussed the prospect of a search with Commandante Salazar, and that Commandante Salazar wanted permission from Mexico City. Bowen was calling

Mexico City for the purpose of obtaining direction from an official. (RT 635).

After this phone call, White unsuccessfully attempted to contact the Second Deputy of the Attorney General's Office in Mexico City, Senior Ortega Padilla. (RT 552). Similar efforts were made to contact the Director General of the Mexican Federal Judicial Police. Although White knew the acting Attorney General of Mexico, apparently no efforts were made to contact him or to contact any member of the Mexican judiciary. (RT 554). On January 25, 1986, White eventually contacted Director General Ventura by telephone. (RT 555). Apparently Ventura declined to contact Commandante Salazar directly, but requested that a message be delivered. According to White's testimony, Director General Ventura said it would far easier to do

it that way, and there would be " less involvement for everyone concerned." (RT 582). This message was relayed to Agent Bowen.

At approximately 1:00 p.m. on January 25, after receiving the call from Agent White, Bowen assembled a team of three other DEA officers, all of whom knew that respondent Verdugo-Urquidez had been arrested and that he also was a suspect in the Camerena case and one of which was a licensed attorney in Mexico. Agent Bowen instructed his officers that they were to seize any documentary evidence relevant to Verdugo-Urquidez's alleged narcotics activity. At no time did the DEA seek approval from the Justice Department or any United States Attorney's Office for the intended search in Mexico. (infra 10a, 58a-59a) At no time did the DEA discuss

obtaining a search warrant from an American magistrate. (infra 10a-11a) Agent Bowen also testified that one of the purposes of the search was to seek evidence relating to the investigation into the death of DEA Agent Enrique Camarena. The commandante, however, was only advised that the purpose of the search was to uncover documentary evidence relating to narcotics trafficking. (RT 372-374, 617).

In Mexicali, agent Bowen requested the assistance of Commandante Salazar. At the evidentiary hearing in this matter, Agent Bowen denied knowing any information whatsoever about Commandante Salazar being a corrupt official. (RT 381). This testimony, however, was contradicted by Agent Matthew J. Maher, who testified that he had learned information about the Commandante being a cor-

rupt official from possibly DEA Agents Bowen, Lizzaraga or O'Brien. (RT 679). Specifically, Maher had been advised that the commandante was involved in a number of illegal activities and was generally thought to be corrupt. (RT 680-681). DEA Agent Robert Martinez also testified that he had a discussion with Agents O'Brien, Ramos and Bowen to the effect that the Commandante was involved in illegal activities including such things as graft and accepting bribes. (RT 714). The Government subsequently objected to any further cross-examination regarding the corrupt activities of Mexican officials. (RT 726). This objection was sustained by Judge Irving concluding that the good faith belief of the agents was irrelevant to the issue. (RT 726). Accordingly, respondent Verdugo-Urquidez was precluded from

developing the full extent of information in the possession of the DEA at the time suggesting that the Mexican officials were not acting in accordance with Mexican law.

After Agent Bowen instructed Commandante Salazar to assist in the search, Salazar had reservations and accordingly, made a phone call apparently to one of his superior officers. He also left the office purportedly to visit with the "delegado," the official representative of the Mexican Attorney General of Mexicali. (infra 59a-60a) After returning, at approximately 6:00 p.m. that evening, the Commandante along with ten to fifteen MFJP officers and the DEA agents drove to the Mexicali residence. One of the MFJP officials accompanying the DEA agents was a fugitive with outstanding warrants in the

Southern District of California. (RT 721-722). Agent Bowen testified that he was specifically aware that one of these police officers was a fugitive at the time he assisted in the search of the Mexicali residence. (RT 776-778). An entry team broke out the glass door and entered the residence. Subsequently all four DEA agents entered the residence, but did not search the house at this time. (infra 61a). Because it was already late, and because San Felipe was two hours away, Commandante Salazar and the DEA agents decided to drive and search the San Felipe house first. A group of the MFJP officers was left to guard the Mexicali residence, but were told not to search it until they returned. (infra 61a) The DEA agents and the remaining MFJP officers then drove to San Felipe. Initially, Agent Bowen

testified that he had personally been to the San Felipe residence. (RT 336). Subsequently, Agent Bowen retracted this statement testifying that he had never previously been to this residence. (RT 775). Commandante Salazar and the DEA agents then contacted an occupant of the San Felipe residence, a female identified as Ms. Tafolla. Initially, the Commandante questioned Ms. Tafolla who denied knowing respondent Verdugo-Urquidez. However, after a brief search of the residence a paper was uncovered with respondent Verdugo-Urquidez's name on it. The Commandante then began arguing with Ms. Tafolla and she finally conceded that she knew respondent Verdugo-Urquidez. Apparently Mr. Tafolla subsequently provided information that respondent Verdugo-Urquidez's residence was, in fact, at Playa del

Sol. (RT 334-335). The agents were then led to a residence at Playa del Sol (RT 335). The DEA agents and the MFJP searched the Playa del Sol residence for approximately two hours. (RT 338). The District Court found that "the DEA agents actively participated in the search itself, both in terms of actually looking for relevant documentary items and identifying as relevant those documentary items discovered by MFJP officers. At the conclusion of the search, which occurred some time before midnight, the seized items were turned over to the DEA agents. The MFJP officers seized several weapons as well as a 1984 Grand Marquis. Neither the MFJP nor the DEA left a receipt or inventory identifying the seized items. (infra 62a)

The Commandante and the DEA then returned to the Mexicali residence arriv-

ing approximately two hours after leaving San Felipe. The District Court found that Commandante Salazar, at least two or three of the MFJP officers, and three of the four DEA agents conducted a room by room search of the Mexicali residence. The DEA agents seized evidence thought relevant while the MFJP brought documents they found to Agent Bowen who in turn decided whether the DEA wanted them. At this residence, the Commandante was not specifically advised as to what documents the DEA were seeking. The agents did not attempt to prepare a list of items they would be seeking and they did nothing to safeguard any valuables that might have been in the residence. (infra 63a) Agent Bowen was not concerned that jewelry or money might be taken by the MFJP. (RT 396). Additionally, no receipts and

inventory was prepared and the agents left no notes as to what they were taking or that they had, in fact, searched the residence. No receipt of documents was ever prepared. (RT 397).

Near the conclusion of the search, the Commandante advised Agent Bowen that he was tired and wanted to leave. At that time, a general seizure of all remaining documents located in the residence was made. These documents were then placed in a single briefcase and turned over to Agent Bowen. (infra 64a) The agents finally left the residence at approximately 4:00 a.m. (RT 776). The agents returned to the DEA station at Calexico with the briefcase. Sometime thereafter the agents inspected the contents of the briefcase. (infra 64a) At no time did the agents seek a search warrant for the briefcase. (infra 10a-11a) Written

reports relating to the seizure of documents were not prepared until August of 1986, in response to a request by Assistant United States Attorney. Of the seized evidence, the Government sought to introduce a tally sheet purportedly found during the search of the Mexicali residence, which allegedly reflects quantities of marijuana smuggled by respondent Verdugo-Urquidez into the United States. (infra 64a)

II.

The District Court suppressed the evidence seized from both premises finding that the DEA agents had sufficiently participated in the search as to make the searches a "joint venture" between the American and Mexican agents. The Court found that the Fourth Amendment was intended to protect an alien already in the custody of the United

States and charged in a criminal complaint, from searches of his foreign residences conducted by United States agents for the express purpose of obtaining evidence relevant to the pending prosecution. (infra 214a) Accordingly, the Court held that the agents were required to secure a warrant before conducting the searches. The Court also referred to the Mexican Constitution, which similarly contains provisions requiring a warrant. The Court also rejected the Government's contention that the exclusionary rule should not apply where United States officers conducting a foreign search followed their foreign counterparts and reasonably believed that they were proceeding lawfully. The Court noted that it was doubtful that the DEA agents' belief in the lawfulness of the searches, whether in

good faith or not, could be considered reasonable. Neither Bowen nor White, the two senior agents involved in the searches, thought it necessary to seek either legal advice or legal authorization regarding the searches from local United States Attorney's Office or the Department of Justice. (infra 231a). The Court finally held that the searches, even if the warrant clause were excused were unreasonable within the meaning of the Fourth Amendment. Specifically the court noted that the Government had not sought to demonstrate any exigent circumstances excusing the need for a warrant. (infra 234a).

III.

The Government appealed from the District Court's order suppressing the evidence obtained from respon-

dent's Mexicali residence. The Court of Appeals affirmed by a divided vote. The Court of Appeals held that Verdugo-Urquidez, a foreign national, may invoke the Fourth Amendment to challenge the reasonableness of a search occurring in a foreign country. The Court rejected the contention that because the Fourth Amendment begins with the phrase "the people" it does not embrace foreign nationals in United States custody, being prosecuted for criminal offenses. The Court also found it "odd indeed that aliens in this country would be entitled to a fair trial under the Sixth Amendment and to due process under the Fifth Amendment, but would not be extended the protections of the Fourth Amendment against unreasonable search and seizures of their property abroad." (infra 47a) After concluding that respondent

Verdugo-Urquidez, did have a Fourth Amendment right to object, the Court concluded that the actions of the DEA agents fell within the scope of the "joint venture" doctrine noting that American authorities planned and instigated the search to be used in an American trial; there was no existing Mexican investigation of respondent then under way; the DEA actions took place before, during and after the search; MFJP informed the DEA that they could keep all evidence seized during the search; it was the DEA who took the initiative in ensuring the search took place after respondent's arrest; and the DEA, when contacting the MFJP, were not only seeking assistance from the Mexican police but were asking permission to run their own operation. Also, the Court noted that Agent Bowen, in fact, specified

which documents were the object of the search, evaluated documents located during the search for determination of whether they would be seized and, in fact, kept all documents.

The Court concluded that "in short, it is clear that the DEA controlled the operation." The Court finally held that notwithstanding the geographic limitation under Rule 41 of the Federal Rules of Criminal Procedure, they could not relieve the Government from its obligation to obtain a search warrant simply because the place to be searched by the Government is outside the country. "Reason to do so would be to treat foreign searches differently from domestic searches just because they occur in a foreign place." (infra 78a)

REASONS FOR NOT GRANTING PETITION

A. CERTIORARI SHOULD BE DENIED IN THAT PREVIOUS RULINGS OF THIS COURT SUPPORT THE HOLDING OF THE LOWER COURT.

This court has repeatedly held that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable." Mincey v. Arizona, 437 U.S. 385, 390 (1978) (quoting Katz v. United States, 389 U.S. 347, 357 (1967)). This court need not reach the issue posed by petitioner relating to the search of a residence in a foreign country in light of the particular facts of the search at issue. At approximately 3:00 to 4:00 a.m. during the search of Verdugo-Urquidez's residence, the Mexican commandante grew tired, placed all remaining documents in a single briefcase and handed the briefcase to DEA Agent Bowen. The commandante advised

Bowen that he wanted the search to end and that he could review these documents at a later time. Bowen accepted the briefcase and transported it back to the DEA office in Calexico, California. Sometime thereafter, Bowen without seeking a search warrant in the United States, searched the briefcase and inventoried its contents.

Initially it should be noted that aliens in this country are sheltered by the Fourth Amendment. Au Yi Law v. INS, 445 F.2d 217, 223 (D.C. Cir.), cert. denied, 404 U.S. 864 (1971). See also, plurality opinion in Immigration and Naturalization Services v. Lopez-Mendoza, 468 U.S. 1032, 1050 (1984), wherein the court stated:

> We do not condcne any violations of the Fourth Amendment that may have occurred in the arrests of respondents Lopez-Mendoza and Sandoval Sanchez. . . . Our conclu-

> sions concerning the exclusionary rule's value might change, if there developed good reason to believe that fourth amendment violations by INS officers were wide spread. Id. at 1050.

In their dissenting opinions, four other justices expressed the view that illegal aliens have fourth amendment rights. See Id. at 1051 (J.), Id. at 1055; White, J.) (joined in pertinent part by Stephens, J.) and Id. at 1060 (Marshall, J.).

Moreover, even the Solicitor General of the United States conceded that illegal aliens have fourth amendment rights in that case, Brief for Petitioner at 10-11 INS v. Lopez-Mendoza, 468 U.S. 1032 (1984).

At the time of the search of the briefcase, respondent Verdugo-Urquidez was and had been securely in United States' custody. The briefcase, although ini-

tially seized in Mexico, was detained and transported to the United States for subsequent search. This court, in United States v. Place, 462 U.S. 696 (1983), has previously indicated that the continuous detention of luggage suspected of being utilized for narcotics trafficking violated the Fourth Amendment when continuously detained in excess of 90 minutes before searching it. Similarly the continuous seizure and detention of respondent's briefcase for a time period clearly in excess of 90 minutes, (although the exact time of the subsequent search is not clear), violated this same principle.

Moreover, once the briefcase was exclusively in the possession of United States law enforcement officers in the United States and absent any exigent circumstances, this court has held that

a warrant is required. In United States v. Chadwick, 433 U.S. 1 (1977), this court previously ruled on facts remarkably similar to those before this court. There, a locked footlocker was transported by Federal agents to the federal building after the footlocker had been lawfully seized by federal agents. The footlocker was taken from the open trunk of a parked automobile during the arrests of those who were in possession of the footlocker outside a train terminal. The agents acting without a search warrant and without the consent of the arrested persons, but with sufficient probable cause to believe that the footlocker contained contraband, opened the footlocker in the federal building. The opening of the footlocker occurred approximately one hour after the arrests of the defendants. There, the Court held:

> Once law enforcement officers have reduced luggage or other personal property not immediately associated with the person of the arrestee to their exclusive control and there is no longer any danger that the arrestee might gain access to the property to seize a weapon or destroy evidence, a search of that property is no longer an incident of the arrest. Here, the search was conducted more than an hour after the federal agents had gained exclusive control of the footlocker and long after respondents were securely in custody; the search therefore cannot be viewed as incidental to the arrest or as justified by any other exigency. . . . In our view, when no exigency is shown to support the need for an immediate search, the Warrant Clause places the line at the point where the property to be searched comes under the exclusive dominion of police authorities. Id. at 15.

The legality of the initial seizure of the footlocker, or as in this case, the briefcase, does not determine the legality of the subsequent search. Here the briefcase was exclusively in federal custody in the United States and respondent was securely in custody. Bowen made no effort at any point to seek a warrant

for the search of the brief case. See, Arkansas v. Sanders, 442 U.S. 753 (1979) (requiring a warrant for the search of personal luggage taken from an automobile).

Moreover, there is no doubt that Agent Bowen's actions in searching through the briefcase and reviewing documents contained therein constituted a search. See Arizona v. Hicks, 480 U.S. 321 (1987) (holding that an officer's moving of a turntable in order to obtain serial numbers constituted a search).

Given the circumstances that the search occurred in the United States (by the United States officers) at a time when respondent Verdugo-Urquidez was albeit involuntarily, present in the United States, this court need not determine the question presented by petitioner relating to the search of respondents

residence in Mexicali. Accordingly, certiorari should be denied.

B. THE OPINION BELOW DOES NOT CREATE A CONFLICT OF OPINIONS AMONG THE CIRCUITS OR CONFLICT WITH EXISTING LAW OF THIS COURT.

(1) The law enforcement practices of foreign counties are not expected to conform to Fourth Amendment standards and the exclusionary rule does not normally apply to foreign searches conducted by foreign officials. United States v. Janis, 428 U.S. 443, 446 (1976); United States v. Hensel, 669 F.2d 18, 25 (1st Cir.), cert. denied, 461 U.S. 958 (1983). The circuit courts have unanimously recognized two express exceptions to this general rule. First, if the conduct of the foreign authorities in conducting the search "shocks the conscience" of the American people, United States v. Toscanino, 500 F.2d

267 (2d Cir. 1974); and second, if American officials participated in the foreign search or if the foreign authorities were acting as agents for their American counterparts; United States v. Jordan, 1 M.J. 334, 338 (C.M.A. 1976); United States v. Hensel, 699 F.2d 18, 25 (1st Cir. 1983); Best v. United States, 184 F.2d 131, 138 (1st Cir. 1950); Stowe v. Devoy, 588 F.2d 336, 341 (2d Cir. 1978); United States v. Wolfish, 525 F.2d 457, 463 (2d Cir. 1985); United States v. Demanett, 627 F.2d 862, 866 (3d Cir. 1980), cert. denied, 450 U.S. 410 (1985); United States v. Underseal, 794 F.2d 920, 928 (4th Cir. 1986); United States v. Hawkins, 661 F.2d 436, 455-56 (5th Cir. 1981); United States v. Morrow, 537 F.2d 120, 139 (5th Cir. 1976); United States v. Marzano, 537 F.2d 257, 270

(7th Cir. 1976); United States v. Benedict, 647 F.2d 928, 930-31 (9th Cir. 1981); United States v. Rose, 570 F.2d 1358, 1361-62 (9th Cir. 1978); Stonehill v. United States, 405 F.2d 738, 743 (9th Cir. 1968), cert. denied, 395 U.S. 960 (1969); United States v. Mundt, 508 F.2d 904, 906 (10th Cir. 1975); United States v. Rosenthal, 793 F.2d 1214, 1231 (11th Cir. 1986) modified, 801 F.2d 378 (1986), cert. denied, ___ U.S. ___ (1987); Powell v. Zuckert, 366 F.2d 634, 640 (D.C. Cir. 1966).

All of these cases have recognized the principle that the exclusionary rule to the Fourth Amendment does not apply to evidence seized by foreign authorities unless there is in essence a "joint venture" between United States officials and foreign officials. The circuits

have unanimously cited this proposition of law utilizing different terminology albeit rarely have the courts found a "joint venture" to, in fact exist. See United States v. Peterson, 812 F.2d 486 (9th Cir. 1987) where the court found that DEA monitoring and translation of conversation intercepted by Philippino wiretap was a "joint venture."; United States v. Emery, 591 F.2d 1266 (9th Cir. 1978) (wherein the Court found a joint venture with respect to interrogation in violation of the Fifth Amendment); United States v. Hensel, 669 F.2d 18 (1st Cir.), cert. denied, 461 U.S. 958 (1983) (where the Court found a joint venture but did not find a violation of the Fourth Amendment).

The opinion of the court below is entirely consistent with this line of

cases in the other circuits and with the prior opinions of this court in its application of this principle of law. Petitioner's principal reliance upon this court's decision in Johnson v. Eisentrager, 339 U.S. 763 (1950), for the proposition that foreign nationals do not enjoy protections of the Fourth Amendment is misplaced. The plaintiffs in that case sought habeas corpus relief to review the decision of a military commission in the time of war. The plaintiffs were in fact German nationals captured in China by the United States army, tried and convicted in China by an American military commission for violations of war committed in China prior to their capture. The continued confinement of these German nationals occurred in Germany. In concluding that the German

nationals had no right of access to the courts, this Court concluded:

> "We have pointed out that the privilege of litigation has been extended to aliens whether friendly or enemy, only because permitting their presence in the country implied protection. No such basis can be invoked here, for these prisoners were at no relevant time within any territory over which the U.S. is sovereign, and the scenes of their offense, their capture, their trial, and their punishment were all beyond the territorial jurisdiction of any court of the United States. Id. at 777-778."

Accordingly, the Court relied upon six separate factors for the determination that the aliens had no right of access to the American judicial system: the plaintiffs were (1) enemy aliens; (2) had never been or resided in the United States; (3) were captured outside of U. S. territory and there held in military custody as a prisoner of war; (4) were tried and convicted by a military commission sitting outside the United

States; (5) for offenses against the laws of war committed outside the United States; and (6) were at all times imprisoned outside the United States. Of the six factors relied upon by the Court to reach their holding, the only factor in common is that respondent VERDUGO-URQUIDEZ is an alien.

In contrast to the Nazis in Johnson, the basis for exercising jurisdiction over Verdugo-Urquidez is that he, at the time of the search, was in the United States and was involuntarily a resident. Although captured outside of the territory, respondent was held in custody pursuant to a judicial warrant issued under the Fourth Amendment for his arrest. Respondent Verdugo-Urquidez was awaiting trial in the United States for offenses against the laws of the United States committed inside the United States and

at all times has been imprisoned within the United States. The emphasis of this Court's ruling in Johnson was that the Judicial branch had no contacts whatsoever with the petitioners and accordingly, exercised no jurisdiction over their matter. In contrast, respondent in the instant case is being prosecuted in the United States, by the authority pursuant to executive and judicial branches and is accordingly, entitled to the protections of our Constitution.

The Johnson court expressly recognized that in past cases affording constitutional rights to aliens', it was the aliens presence within the territorial jurisdiction which gave the judiciary the power to act.

Affording respondent Fourth Amendment rights is entirely consistent with this court's opinion in Chin Yow v. United

States, 208 U.S. 8 (1908) (where the Court long ago extended habeas corpus relief to non-resident aliens seeking admission to the country to assure a fair hearing of his claims to citizenship).

In Yick Wo v. Hopkins, 118 U.S. 356 (1886), this court extended to the person and property of aliens important constitutional guarantees such as the due process of law assured by the Fourteenth Amendment. The Court held that these provisions are "universal in their applications, to all persons in the territorial jurisdiction, without regard to any differences to race, color, or of nationality." Id at 369.

Similarly, this court has extended significant constitutional protections to aliens within the United States, without distinguishing between those who

are here legally or illegally; In re Ross, 140 U.S. 453, 464 (1891) (holding that although Fifth and Sixth Amendments do not apply to trials in consular courts, there are guarantees applied to citizens and others within the United States, or who are brought there for trial); Wong Wing v. United States, 163 U.S. 228, 238, (1896) (holding that all persons within the territory of the United States are entitled to protection guaranteed by the [fifth and sixth] amendments); United States ex rel. Turner v. Williams, 194 U.S. 279, 291 (1904) (observing that Fifth and Sixth Amendments protect aliens once they are in this country); Mathews v. Diaz, 426 U.S. 67, 77 (1976) (explaining that all aliens within the jurisdiction of the United States enjoy the protections of the Fifth and Fourteenth Amendments and

may not be invidiously discriminated against by the Federal government). In Mathews, this court held that the Fifth Amendment guarantee of due process applies even to aliens "whose presence in this country is unlawful, involuntary, or transitory." Id. at 77.

More recently in Plyler v. Doe, 457 U.S. 202 (1982), this court reaffirmed application of the Fourteenth Amendment's guarantee of equal protection rights to illegal aliens. Petitioner's insistence that a conflict exists between this court's prior rulings and the rule of the court below is unfounded. The decision below concluded that by virtue of the fact that the idea to search respondent's residence was conceived in the United States by United States agents intending to obtain evidence in a United States prosecution and

to be utilized in a court proceeding against a defendant already in custody in the United States mandated application of the Fourth Amendment. This conclusion is in fact logically sound and consistent with the prior rulings of this court.

2. In Mapp v. Ohio, 367 U.S. 643 (1961), this court held that the right to privacy assured in the Fourth Amendment is enforceable against the states through the Due Process Clause of the Fourteenth Amendment.

Prior to this pronouncement in Byars v. United States, 273 U.S. 28, 32-34 (1927) and Lustig v. United States, 338 U.S. 74 (1949), this Court concluded that where federal agents substantially participate with State agents in a search or seizure, the parameters of the fourth amendment must be followed.

These three ruling in view of the holdings in Plyler v. Doe, 457 U.S. 202, 210 (1982), Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886), and Mathews v. Diaz, 426 U.S. 67, 77 (1976) (holding that aliens have fourteenth amendment rights) demonstrate an irreconcilable flaw in petitioner's suggestion that the Fourth Amendment does not protect respondent. According to Mapp, the fourteenth amendment mandates application of the fourth amendment to the states. Aliens have the right to assert fourteenth amendment rights against state action. Therefore, if state law enforcement agents had conducted the search, by virtue of these holdings, respondent could challenge the state action. However, since federal agents were involved in the instant search, the fourteenth amendment is not applicable.

Thus, petitioner would have this court resurrect the "silver platter" doctrine, thereby creating a substantial difference in the protections of due process of law in the fifth and fourteenth amendments.

In Mapp v. Ohio, 367 U.S. 643 (1961), this court held that the fifth amendment privilege against self-incrimination implemented the fourth amendment in such cases, and that the two guarantees of personal security conjoined in the Fourteenth Amendment to make the exclusionary rule obligatory upon the States.

Moreover, in Malloy v. Hogan, 378 U.S. 1 (1963), this court expressly rejected such a distinction stating:

> We have held that the guarantees of the First Amendment, Gitlow v. New York, supra; Cantwell v. Connecticut, 310 U.S. 296; Louisiana ex rel. Gremillion v. NAACP,

> 366 U.S. 293, the prohibition of unreasonable searches and seizures of the Fourth Amendment, Ker v. California, 374 U.S. 23, and the right to counsel guaranteed by the Sixth Amendment, Gideon v. Wainwright, supra, are all to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment. (emphasis added)
>
> Id. at 10.

Accordingly, if the fourteenth amendment would prohibit the search in the instant case by state officials, so must the fifth amendment proscribe the instant federal agents' actions.

C. THE FIFTH AMENDMENT MANDATES AFFIRMANCE OF THE LOWER COURT'S HOLDING

In Rochin v. California, 342 U.S. 165 (1952), this court held that the Due Process Clause required it to determine from, "the whole course of the proceedings . . . whether they offend those canons of decency and fairness

which express the notions of justice of English speaking peoples even toward those charged with the most heinous offenses." Id. at 169.

This aspect of due process was also cited in United States v. Russell, 411 U.S. 423 (1973), wherein this court suggested that while certain law enforcement practices may not violate the Constitution or federal law, they may be "so outrageous that the due process principles would absolutely bar the government from invoking judicial process to obtain a conviction." Id. 431-432.

Additionally, in United States v. Toscanino, 500 F.2d 267 (2d Cir. 1974), the Second Circuit recognized that where a United States joint venture with foreign officials shocked the conscience, exclusion is applicable.

Respondent Verdugo-Urquidez respectfully submits that the conduct of DEA agents in conjunction with foreign officials falls within the parameters of this Fifth Amendment exclusionary rule. Respondent Verdugo-Urquidez was kidnapped in Mexico in violation of Mexican law at the instigation of United States officials. Respondent was blindfolded, handcuffed, placed in the back seat of an automobile without any indication as to his intended destination. Respondent was precluded by the District Court from fully developing at an evidentiary hearing the facts regarding his kidnapping. However, shortly after his "seizure" in the United States, respondent was then questioned without advising him of his Miranda rights and his address was obtained. Shortly thereafter, the DEA agents conceived of the idea to search

his residence in Mexico. The DEA agents then sought the cooperation of a corrupt Mexican official.[4]

Assisted by a fugitive and misinformation to the MFJP regarding one of the true purposes of the search, the agents searched not only the Mexicali residence but also a San Felipe residence and Playa del Sol residence. Apparently the latter residence was searched sometime after midnight based only on the representation by the Tafollas that it was in fact respondent Verdugo-Urquidez's residence. The searches were conducted by DEA agent licensed to practice law in

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4/ Inquiries into the details of the DEA agents' knowledge of these officials' corrupt actions were not developed by virtue of the District Court's ruling that good faith reliance upon foreign officials would not be a basis for sustaining the search.

Mexico, and accordingly, obviously aware of the provisions of the Mexican Constitution prohibiting searches of residences without prior warrant. The totality of the circumstances indicate not only a total disregard for Mexican, United States and International law but also strongly support the conclusion that the holding of the court must be affirmed not only on Fourth Amendment grounds but on Fifth Amendment due process considerations.

D. PETITIONER IS NOW RAISING FOR THE FIRST TIME ARGUMENTS NOT PRESENTED TO THE TRIAL COURT.

Petitioner submits that it is impracticable for agents engaged in overseas investigations to seek out an American magistrate whenever they wish to conduct a search or seizure abroad. Accordingly, petitioner suggests that the logistical difficulties of obtaining

warrants coupled with the practical realities of agents conducting searches "being at the mercy of foreign officials" mandates reversal of the lower court's ruling. Accordingly, the argument goes, American law enforcement agents abroad cannot be expected to follow the competing agendas set by an American warrant.

Petitioner is in fact ignoring the true facts of this particular search. It should be emphasized that according to the findings of Judge Irving, the basis for respondent Verdugo-Urquidez's initial "seizure" by Mexican authorities in Mexico was the result of an American warrant. Thus apparently, Petitioner is suggesting a distinction between searches occurring in foreign countries and seizures, a distinction which should not logically exist. In this particular

instance, obviously great deference was given to United States agents' desires by their Mexican counterparts, in fact demonstrating the fallacy of the proposed policy arguments for non-application of the Fourth Amendment. Here in fact, the agents initiated the idea for the search in the United States and could easily have contacted a United States magistrate prior to departing for Mexico. Thus, it was not at all impracticable for these agents to follow the requirements of the Fourth Amendment. Moreover, here the agents were not at the mercy of any foreign officials, but in fact, directed the search and controlled all aspects. In fact, no competing agenda existed whatsoever. Finally, Petitioner suggests that even should the Fourth Amendment apply, it should require only reasonableness and not the

additional burden of obtaining and complying with a warrant issued by an American court. Citing United States v. Williams, 617 F.2d 1063 (5th Cir. 1980), and United States v. Arra, 630 F.2d 836 (1st Cir. 1980), Petitioner argues that the opinion below is at odds with the decision of other circuits that have relaxed the warrant requirement in deference to the "impracticality presented by extraterritorial searches." In essence, Petitioner is at this point suggesting that a certain exigent circumstance existed which excused compliance with the warrant requirement of the Fourth Amendment. This exigency derives from the inordinate impairment to the agents ability to do their job overseas. At the trial court level, the Government did not argue that there were exigent circumstances excusing the need for a

warrant. Indirectly suggesting the impracticalities of extraterritorial searches presents certain exigent circumstances excusing the need for a warrant is in essence presenting a new argument not initially presented to the trial court.

E. RESPONDENT WAS PRECLUDED FROM FULLY DEVELOPING FACTS PERTINENT TO ISSUES RAISED BY PETITIONER.

In the context of the evidentiary hearing relating to the suppression, respondent Verdugo-Urquidez was precluded from fully developing issues relating to the DEA agents' knowledge of the corrupt reputation of the officials purportedly authorizing the search under Mexican law. Moreover, petitioner was denied an evidentiary hearing whatsoever relating to the circumstances of the "seizure" of respondent Verdugo-Urquidez by Mexican officials in Mexico, ironical-

ly pursuant to a warrant issued under the authority of the Fourth Amendment for the seizure of the respondent's person. Implicit in the Government's argument that even if the Fourth Amendment applies, the impracticalities of obtaining international assistance in deference to United States warrants relies upon a set of facts incompletely developed at the lower court level.

CONCLUSION

The Court has previously ruled on factual circumstances which support the holding of the lower court. Accordingly, the issue presented by petitioner need not be decided. Moreover, the opinion below is fundamentally sound in concluding that respondent, who was in United States custody, and being prosecuted in United States courts had a Fourth Amendment right to contest the

search and continuous seizure of documents from his residence. The application of the Fourth Amendment is consistent with prior case law and the other circuits. Finally, the arguments of petitioner are inconsistent with previous rulings by this court and relies upon facts not fully developed at the evidentiary hearing which would under-

mine their arguments. In light of these factors certiorari should be denied.

DATED: MARCH 27, 1989

Respectfully submitted,

MICHAEL PANCER, Esq.

PATRICK Q. HALL, Esq.

CHARLES L. GOLDBERG, Esq.

Attorneys for Respondent
RENE MARTIN Verdugo-Urquidez

APPENDIX A

UNITED STATES OF AMERICA,
Plaintiff-Appellant

v.

RENE MARTIN VERDUGO-URQUIDEZ,
Defendant-Appellee

No. 87-5061

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Argued and Submitted Dec. 10, 1987

Decided Aug. 29, 1988

Before WALLACE, NORRIS and THOMPSON,
Circuit Judges

DAVID R. THOMPSON, Circuit Judge:

Rene Martin Verdugo-Urquidez is in custody awaiting trial on twenty counts of a forty-one-count indictment returned against him and thirty-eight other defendants. The indictment charges Verdugo-Urquidez with numerous narcotics and narcotics-related criminal violations, including conspiracy to import multi-ton

quantities of marijuana into the United States, possession with intent to distribute multi-ton quantities of marijuana, and engaging in an on-going criminal enterprise. Verdugo-Urquidez's presence in the United States is the result of his arrest by Mexican police officers in Mexico and his delivery by them, across the border, into the waiting arms of the United States government. Verdugo-Urquidez challenged the district court's jurisdiction over him because of the manner in which the United States obtained his custody. The district court rejected this contention, and Verdugo-Urquidez has not sought to appeal that ruling. The government appeals from the district court's order suppressing certain evidence obtained by United States Drug Enforcement Agency ("DEA") agents during their search of Verdugo-

Urquidez's residence in Mexicali, Mexico.

The government raises two major arguments on appeal. First, the government contends that Verdugo-Urquidez, a Mexican national, may not invoke the fourth amendment to the Constitution to challenge the DEA's actions in searching his Mexicali home. In the alternative, the government argues that even if the fourth amendment extends to Verdugo-Urquidez, the evidence seized nonetheless should have been admitted because the DEA agents reasonably relied on assurances of Mexican officials that the search was permissible under Mexican law, and the search was carried out in a reasonable manner. We have jurisdiction of this interlocutory appeal under 18 U.S. Section 3731. We conclude that Verdugo-Urquidez is entitled to the

protections of the fourth amendment, and that the district court properly suppressed the evidence obtained in the search of his Mexicali residence.

I.

FACTS

Rene Martin Verdugo-Urquidez is reputed to be a drug smuggler and a killer. The DEA believes him to be one of the leaders of a large and violent organization based in Mexico, which smuggles large quantities of marijuana, cocaine and heroin into the United States. The DEA also believes Verdugo-Urquidez to have participated in the brutal and revolting kidnapping and torture-murder of DEA Special Agent Enrique Camarena Salazar. If these allegations are proved true at trial, there is little doubt that Verdugo-Urquidez's

conduct has placed him beyond the pale of civilized society. But in this country, a person is presumed innocent until proven guilty. We would not permit a jury to discard this fundamental precept of criminal law simply because the accused is charged with a serious crime. Likewise, we will not allow ourselves to be swayed by the DEA's suspicions, no matter how well founded, or by the government's repeated assertions, that Verdugo-Urquidez is in some way responsible for the death of Special Agent Camarena.

Since the late 1970s, the DEA has kept abreast of Verdugo-Urquidez's alleged activities as a drug smuggler. Based on an informant's tip that Verdugo-Urquidez planned to transport several tons of marijuana into the United States, the DEA filed a sealed complaint against him

on August 3, 1985, charging him with various violations of the criminal law of the United States. Based on this complaint, the United States District Court for the Southern District of California issued a warrant for his arrest. Thereafter, the DEA stepped up its investigation efforts and attempted to apprehend Verdugo-Urquidez on one of his frequent trips to the United States. Unable to locate him in this country, the DEA confirmed that Verdugo-Urquidez resided in Mexicali, Mexico, and contacted the United States Marshals Service to determine whether it would be feasible for Mexican authorities to apprehend Verdugo-Urquidez in Mexico and deliver him to the United States for trial.

In January 1986, the United States Marshals Service contacted Mexican law enforcement officers, who advised the

Service that Verdugo-Urquidez could be arrested by Mexican officers in Mexico, provided there was an outstanding United States warrant for his arrest. The Marshals showed the Mexican officers the warrant for Verdugo-Urquidez's arrest. The district court found that the following events then took place: On January 24, 1986, while driving his car in San Felipe, Baja California, Mexico, Verudgo-Urquidez was stopped by six Mexican police officers, at least one of whom showed him a badge. Verdugo-Urquidez was ordered from his car, arrested, handcuffed and placed in the back seat of the Mexican officers' unmarked car. With his hands still cuffed behind his back, the police forced Verudgo-Urquidez to lie face down on the car seat, with his head covered by his jacket. For most of the two hour ride to

the Mexican-American border, Verdugo-Urquidez either lay on the seat covered with his jacket or lay there blindfolded. At no time did the Mexican police officers explain to Verdugo-Urquidez where they were going or why he had been arrested. When the Mexican officers arrived at the border, they removed Verdugo-Urquidez from their car and walked him to where the United States Marshals waited.[1] The Marshals placed Verdugo-Urquidez under arrest and drove

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[1]/ Soon after the apprehension and delivery of Verdugo-Urquidez to the United States, the six Mexican police officers reported to their American counterparts that they were receiving death threats and feared for their safety and that of their families. The Mexican officers and their families subsequently were permitted to enter the United States, where they now live. A formal accusation has been filed by a prosecutor in the state of Baja California, Mexico, charging the six men with kidnapping.

him to the United States Border Patrol station in Calexico, California. The Marshals then phoned the DEA's resident agent in Calexico, Terry Bowen, who testified he had been waiting for the call informing him of Verdugo-Urquidez's arrest. The DEA took custody of Verdugo-Urquidez and delivered him to the Metropolitan Correctional Center in San Diego, California, where he remains incarcerated pending trial.

After the DEA took custody of Verdugo-Urquidez, Agent Bowen discussed with his fellow officers the prospect of searching Verdugo-Urquidez's house in Mexico. Agent Bowen believed that a search of Verdugo-Urquidez's Mexicali residence would disclose cash proceeds from his smuggling operations, as well as documentary evidence of those transactions, including drug ledgers and phone books

listing the names and addresses of his associates. Agent Bowen also hoped that the search would disclose information relevant to the Camarena investigation. Agent Bowen contacted Walter White, the Assistant Special Agent in charge of DEA operations in Mexico. Agent Bowen and Special Agent White discussed the arrest of Verdugo-Urquidez and the possibility of a DEA search of Verdugo-Urquidez's Mexicali residence. Special Agent White told Agent Bowen that he would make some phone calls and would see what could be done.

Thereafter, Agent Bowen received Special Agent White's approval to search the Mexicali residence.[2] On January

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[2]/ At no time did the DEA seek approval from the Justice Department or any United States Attorney's office for the intended search in Mexico. At no time did the DEA seek a search warrant

25, 1988, [sic] a team of four DEA agents drove to Mexicali, Mexico, where they met with the local commandante of the Mexican Federal Judicial Police (MFJP). With the help of several MFJP officers, the DEA searched Verdugo-Urquidez's Mexicali residence, as well as a house owned by Verdugo-Urquidez located in San Felipe, Baja California, Mexico. The search of the Mexicali residence disclosed a tally sheet, which purportedly reflects the quantities of marijuana smuggled into the United States by Verdugo-Urquidez.

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[2]/cont. from an American magistrate. Instead, the DEA sought the Mexican government's permission for the search of the Mexicali residence. We discuss the manner in which the DEA received this authorization to search, and details of the search itself, later in this opinion.

Verdugo-Urquidez moved to suppress the evidence seized from his Mexicali residence. After a hearing, the court concluded that the fourth amendment to the Constitution applied to the DEA's search because it was a "joint venture" of the American and Mexican police officers. Furthermore, the court held that a foreign national is entitled to seek the suppression of evidence seized by American officers during a search conducted in a foreign country on the ground that the search violates the norms established by the fourth amendment. The district court then suppressed the evidence seized by the DEA because it concluded the search was invalid for two reasons: First, the DEA failed to seek a warrant authorizing the search. Second, even if a warrant was not required to authorize the search, the DEA's conduct

in carrying out that search was not reasonable because the search was unconstitutionally general, it occurred after midnight and the DEA failed to leave a contemporaneous inventory of the evidence seized. The government appeals.

II

ANALYSIS

Applicability of Fourth Amendment

The threshold issue we confront is whether a foreign national whose foreign residence has been searched by United States law enforcement officers may challenge that search under the fourth amendment. Strangely enough, this question has not yet been answered by the Supreme Court or definitively resolved by any circuit court of appeals. Indeed, until this case, we have been content

simply to assume that the fourth amendment constrains the manner in which the federal government may pursue its extra-territorial law enforcement objectives. See, e.g., United States v. Peterson, 812 F.2d 486, 489 (9th Cir. 1987).

1. The Fourth Amendment Limits Government Action Abroad

We begin our analysis with a proposition so reasonable and unremarkable that most people would find it bizarre indeed to learn that the rule has ever been otherwise:

> The United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution. When the Government reaches out to punish a citizen who is abroad, the shield which the Bill cf Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another country.

Reid v. Covert, 354 U.S. 1, 5-6, 77 S.Ct. 1222, 1225, 1 L.Ed.2d 1148 (1957) (plurality opinion) (footnotes omitted); see also id. at 56, 77 S.Ct. at 1251 (Frankfurter, J., concurring in the result) ("Governmental action abroad is performed under both the authority and the restrictions of the Constitution."); cf. id. at 66, 77 S.Ct. at 1256 (Harlan, J., concurring in the result) ("The powers of Congress . . . are constitutionally circumscribed. Under the Constitution Congress has only such powers as are expressly granted or those that are implied as reasonably necessary and proper to carry out the granted powers."). And yet, for a time, it was settled law that the Constitution applied "only to citizens and others within the United States, or who are brought there for trial for alleged offenses

committed elsewhere, and not to residents or temporary sojourners abroad." In re Ross, 140 U.S. 453, 464, 11 S.Ct. 897, 900, 35 L.Ed. 581 (1891) (emphasis added). This was said to be so because "[b]y the Constitution, a government is ordained and established 'for the United States of America,' and not for countries outside of their limits. . . . [Therefore, the] Constitution can have no operation in another country." Id. (citations omitted). The Supreme Court soon rejected this constrictive interpretation of the Constitution in favor of a more expansive vision of its reach. See, e.g., Balzac v. Porto Rico, 258 U.S. 298, 312-13, 42 S.Ct. 343, 348, 66 L.Ed. 627 (1922) ("The Constitution of the United States is in force in Porto Rico [sic] as it is wherever and whenever the sovereign power of

that government is exerted."). In its Reid decision, the Court extended the Constitution's application to acts by the federal government in a foreign country. Reid, 354 U.S. at 7-9, 77 S.Ct. at 1225-26; see also Note, The Extraterritorial Application of the Constitution -- Unalienable Rights?, 72 Va.L.Rev. 649, 659 (1986) ([T]he Reid decision . . . represents the abandonment of the nineteenth century concepts of strict territoriality."). In so construing the reach of the Constitution, a plurality of the Court rejected the notion that "only those constitutional rights which are 'fundamental' protect Americans abroad." Reid, 354 U.S. at 9, 77 S.Ct. at 1225 (plurality opinion) (footnote omitted).

From these cases, a proposition of enormous vitality may be drawn: The

Constitution imposes substantive constraints on the federal government, even when it operates abroad. See, e.g., Altzburg, The Reach of the Bill of Rights Beyond the Terra Firma of the United States, 20 Va.J.Int'l L. 741, 745 (1980) ("Wherever and whenever the [federal government] acts it relies on the Constitution as the source of its powers. Whenever it acts, it must, therefore, accept the limits on its power imposed by the . . . Constitution . . . Thus, the Bill of Rights controls the activities of U.S. law enforcement officers wherever they occur."). In applying these substantive constitutional constraints, it is important to recall that

> [t]he concept that the Bill of Rights and other constitutional protections against arbitrary government are inoperative when they become inconvenient or when expediency dictates otherwise is a very dangerous doctrine and if allowed to flour-

> ish would destroy the benefit of a written Constitution and undermine the basis of our Government.

Reid, 354 U.S. at 14, 77 S.Ct at 1229 (plurality opinion). Thus, in the context of this case, which involves the aggressive and laudable pursuit by the federal government of a legitimate law enforcement objective -- the apprehension and prosecution of a suspected drug dealer of the worst sort -- we also must take great pains to ensure that the Constitution does not become the first casualty in the "War on Drugs." See Wisotsky, Crackdown: The Emerging "Drug Exception" to the Bill of Rights, 38 Hastings L.J. 889 (1987). See generally Kamisar, "Comparative Reprehensibility" and the Fourth Amendment Exclusionary Rule, 86 Mich.L.Rev. 1 (1987).

2. Aliens Brought to United States for Criminal Trials May Challenge Federal Government's Conduct under Fourth Amendment

Having concluded that the Constitution limits the government's authority when it acts abroad, we must address the key question in this case: May a nonresident alien challenge the reasonableness of the federal government's actions under the fourth amendment? Under the facts of the present case, we hold that such a challenge may be raised.

The gcvernment's position in this case derives from a vision of the Constitution as a compact between the people of the United States and the federal government. This theory espouses the view that the Constitution should be regarded as a reciprocal arrangement between "The People" and the federal government. See U.S. Const. preamble ("WE THE PEOPLE of

the United States . . . do ordain and establish this Constitution for the United States of America.") That is, "The People" cede to their government substantial authority over them in exchange for which the government agrees to abide by the limitations imposed on it by the Constitution. Verdugo-Urquidez is a nonresident alien. The compact theory tells us, then, that because Verudgo-Urquidez is not one of "The People" to whom the promise of the Constitution runs, he has no right to complain of governmental action in excess of that permitted by the Constitution.

This compact theory of the Constitution has deep roots in our nation's history. The interpretation of the Constitution as a contract also has found some expression in the courts. See,

e.g., Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 471, 1 L.Ed. 440 (1793) (opinion of Jay, C.J.) ("[T]he constitution of the United States is likewise a compact made by the people of the United States, to govern themselves, as to general objects, in a certain manner."); McCulloch v. Maryland, 17 U.S.(4 Wheat.) 316, 404, 4 L.Ed. 579 (1819) (Marshall, C.J.) ("The government of the Union . . . is, emphatically and truly, a government of the people. In form, and in substance, it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit."); League v. De Young, 52 U.S. (11 How.) 185, 202, 13 L.Ed. 657 (1850) ("The Constitution of the United States was made by, and for the protection of, the people of the United States."); In re Ross, 140 U.S. 453,

464, 11 S.Ct. 897, 900, 35 L.Ed. 581 (1891) ('By the Constitution a government is ordained and established 'for the United States of America,' and not for countries outside of their limits. . . . The Constitution can have no operation in another country." (citation omitted)). The compact theory also has its adherents in the academic world. See, e.g., Stephan, Constitutional Limits on International Rendition of Criminal Suspects, 20 Va.J.Int'l L. 777, 782 (1980) (observing that there is a "long held understanding that, in general, foreign nationals abroad are neither parties to nor beneficiaries of the agreement between the federal government and its people embodied in the Constitution").

Notwithstanding these sources, we are not persuaded that the compact theory is

a legitimate mode for applying the Constitution in this case. This is so for three reasons we discuss hereafter. First, the historical evidence is equivocal and many sources may be cited in support of a broader interpretation of the Constitution. Second, the Supreme Court cases discussed above address the distinct problem of the relationship between the states and the federal government, and therefore, provide little help in deciding how the federal government may act when it pursues extraterritorial objectives. Finally, decisions of the Supreme Court extending certain constitutional protections to aliens in other contexts show that the compact theory has been severely limited in its scope.

a. The Historical Record

As we have noted, there are historical sources that support the compact theory of the Constitution. These sources, however, reflect only part of the philosophical concerns reflected in the Constitution and the Bill of Rights. There are many historical records and commentaries explaining that Americans of the Revolutionary Era held a deeply-felt belief in the "natural rights" of man. Indeed, on need look no further than the Declaration of Independence, with its references to "the laws of nature" and inalienable rights." See Declaration of Independence(1776), reprinted in 1 B. Schwartz, The Bill of Rights: A Documentary History 251-52 (1971).

Further historical evidence of the "natural rights" theory abounds. For example, the various states' declarations of rights that served as the forerunners of our Bill of Rights again and again emphasize that the government is to respect the individual's rights: Thus, the preamble to the Vermont Declaration of Rights explains that "all government ought to be instituted and supported, for the security and protection of the community, as such, and to enable the individuals who compose it, to enjoy their natural rights, and the other blessings which the Author of existence has bestowed upon man." Vermont Declaration of Rights (1777), reprinted in 1 B. Schwartz, supra, at 319. And in enumerating the rights enjoyed by the inhabitants of Vermont, we find

> That the people have a right to hold themselves, their houses, papers and possessions free from search or seizure; and therefore warrants, without oaths or affirmations first made, affording a sufficient foundation for them, an whereby and officer or messenger may be commanded or required to search suspected places, or to seize any person or persons, his, her or their property, not particularly described, are contrary to that right, and ought not to be granted.

Id. c.1, art. XI, reprinted in 1 B. Schwartz, supra, at 323.

A number of other sources, from the nineteenth century to the present, support an interpretation of the Constitution that emphasizes an intent to prevent arbitrary encroachment by government on these "natural rights." See, e.g., II J. Kent, Commentaries on American Law 1 (New York 1827) ("The absolute rights of individuals may be resolved into the right of personal security, the right of personal liberty, and the right to acquire and enjoy prop-

erty. These rights have been justly considered, and frequently declared, by the people of this country, to be natural, inherent, and unalienable."). As Professor Schwartz also has explained:

> The dominant conception when the Framers wrote was that stated in Blackstone: "By the absolute rights of individuals, we mean those which are so in their primary and strictest sense; such as would belong to their persons merely in a state of nature, and which every man is entitled to enjoy, whether out of society or in it."

III B. Schwartz, A Commentary on the Constitution of the United States: Rights of the Person (Volume 1) 170 (1968) (emphasis in original; footnote omitted). See generally Grey, Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought, 30 Stan.L.Rev. 843 (1978); Henkin, Rights: Here and There, 81 Colum.L.Rev. 1582, 1584-90 (1981); Note,

supra, 72 Va.L.Rev. at 650 n. 8 (collecting sources). Thus, while the Framers may have used the phrase "compact" to explain the political theory by which the federal government was created, history also teaches that the Founders believed the Constitution would protect their inalienable rights.

Justice Story in his Commentaries on the Constitution of the United States cast considerable doubt on the validity of the compact theory. For instance, Justice Story found it peculiar to think of the Constitution as a contract because constitutions "are not only not founded upon the assent of all the people within the territorial jurisdiction, but that assent is expressly excluded by . . .[restricting] ratification . . . to those, who are qualified voters." 1 J. Story, Commentaries on the Constitution

of the United States Section 327, at 296-97 (Boston 1833). Thus, the Constitution may not be treated as contract because it purports to bind those who did not assent to it, were not permitted to assent to it and, as well, those born after its ratification. id. Section 328, at 297-98. Justice Story concluded that if the Constitution protects all "The People" of the United States, as it surely does, the protection it gives them cannot derive solely from a contract theory.

> It would, indeed, be an extraordinary use of language to consider a declaration of rights in a constitution, and especially of rights, which it proclaims to be "unalienable and indefeasible," to be a matter of contract, and resting on such a basis, rather than a solemn recognition and admission of those rights, arising from the law of nature, and the gift of Providence, and incapable of being transferred or surrendered.

> Id. Section 340, at 309 (emphasis in original).

b. "Compact" Theory in the Supreme Court

Earlier in this opinion, we cited four Supreme Court cases which explained that the Constitution is a compact between the people and the federal government. These cases, however, provide scant guidance in deciding whether the fourth amendment permits Verdugo-Urquidez to challenge an unreasonable search of his Mexicali residence by the federal government. In three of these cases, the Court considered some aspect of the relationship between the states and the federal government. E.g., Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 1 L.Ed. 400 (1793) (considering whether a state may be sued in the Supreme Court by an individual citizen of

another state); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 4 L.Ed. 579 (1891) (holding that a state may not tax an instrumentality of the federal government properly created by Congress in pursuit of an enumerated power); League v. De Young, 52 U.S. (11 How) 185, 13 L.Ed 657 (1850) (holding that a statute passed pursuant to the Constitution of the Republic of Texas could not be challenged as unconstitutional because, until Texas joined the Union, it was a sovereign power not bound by the United States Constitution). Each case involved problems of federalism. The Supreme Court used the compact theory to explain that by ratifying the Constitution, the states surrendered some of their authority to the federal government. Thus, these cases cannot be considered authoritative on the question whether the Constitution applies to the extraterritorial acts of the federal government. Neither do they explain who may assert the protections of the fourth amendment.

Unlike the three cases previously mentioned, In re Ross, 140 U.S. 453, 11 S.Ct. 897, 35 L.Ed. 581 (1891), was one of a different line of cases in which the Court considered the extraterritorial application of the Constitution. The Court held in Ross that because the Constitution applies only within the United States, the trial of an American citizen in an American consular court neither required indictment by a grand jury nor a jury trial. See id. at 464, 11 S.Ct. at 900. But, as we explained supra in subpart II(A)(1), the Ross case is no longer good law in light of Reid v. Covert, 354 U.S. 1, 77 S.Ct. 1222, 1 L.Ed.2d 1148 (1957).

See Reid, 354 U.S. at 5-6, 77 S.Ct. at 1224-25 (plurality opinion); id. at 56, 77 S.Ct. at 1251 (Frankfurter, J., concurring in the result). Moreover, the Ross decision actually supports Verdugo-Urquidez's argument that the fourth amendment applies to him.

> The guarantees [the Constitution] affords against accusation of capital or infamous crimes, except by indictment or presentment by grand jury, and for an impartial trial by a jury when thus accused, apply only to citizens and others within the United States, or who are brought there for trial for alleged offenses committed elsewhere, and not to residents or temporary sojourners abroad.
>
> Ross, 140 U.S. at 464, 11 S.Ct. at 900 (emphasis added).

c. Constitutional Protections for Aliens

A number of cases have extended constitutional protections to resident aliens. See, e.g., Yick Wo v. United States, 118 U.S. 356, 369, 6 S.Ct.

1064, 1070, 30 L.Ed. 220 (1886) (extending fourteenth amendment to resident aliens because that amendment "is not confined to the protection of citizens"); Bridges v. Wixon, 326 U.S. 135, 161, 65 S.Ct. 1443, 1455, 89 L.Ed. 2103 (1945) (Murphy, J., concurring) (emphasizing that among the protections enjoyed by resident aliens are first, fifth and fourteenth amendment rights); Kwang Hai Chew v. Colding, 344 U.S. 590, 597, 601, 73 S.Ct. 472, 477, 479, 97 L.Ed. 576 (1953) (holding that a resident alien is a "person" within the meaning of the fifth amendment). True enough, these cases may be explained by the compact theory. That is, by becoming a resident, an alien "is bound to obey all the laws of the country, not immediately relating to citizenship, during [his or her] sojourn in it." Carlisle

v. United States, 83 U.S. (16 Wall.) 147, 154, 21 L.Ed. 426 (1873); 409 (1877) ("As a foreigner domiciled in the country, . . . [the alien] owed allegiance to the government of the country so long as he resided within its limits."). By accepting the obligations of allegiance to the United States, the alien receives in exchange some measure of constitutional protection.

> The alien, to whom the United States has been traditionally hospitable, has been accorded a generous and ascending scale of rights as he increases his identity with our society. Mere lawful presence in the country creates an implied assurance of safe conduct and gives him certain rights; they become more extensive and secure when he makes a preliminary declaration of intention to become a citizen, and they expand to those of full citizenship upon naturalization.

Johnson v. Eisentrager, 339 U.S. 763, 770, 70 S.Ct. 936, 939, 94 L.Ed. 1255 (1950) see also Landon v. Plasencia,

459 U.S. 21, 33, 103 S.Ct. 321, 329, 74 L.Ed.2d 21 (1982) (discussing Johnson with approval).

On the other hand, the Court has stated that an alien seeking admission to the United States enjoys no constitutional rights. See, e.g., Landon, 459 U.S. at 32, 103 S.Ct. at 329; United States ex rel. Turner v. Williams, 194 U.S. 279, 292, 24 S.Ct. 719, 723, 48 L.Ed. 979 (1904) ("[An alien] does not become one of the people to whom [first amendment rights] are secured by our Constitution by an attempt to enter forbidden by law. . . . [T]hose who are excluded cannot assert the rights in general obtaining in a land to which they do not belong as citizens or otherwise."). Just as it does in the resident alien cases, the compact theory adequately explains these "aliens seeking admis-

sion" decisions. The compact analysis fails, however, upon an examination of those cases in which constitutional protections have been extended to illegal aliens who are within the United States.

The Supreme Court has extended significant constitutional protections to aliens within the United States, without distinguishing between those who are here legally or illegally, or between resident and visitors. See, e.g., Yick Wo v. Hopkins, 118 U.S. 356, 369, 6 S.Ct. 1064, 1070, 30 L.Ed.220 (1886) ("The Fourteenth Amendment . . . is not confined to the protection of citizens. . . . [Its] provisions are universal in their application, to all persons within the territorial jurisdiction [of the United States]."); In re Ross, 140 U.S. 453, 464, 11 S.Ct. 897, 900, 35

L.Ed 581 (1891) (holding that although fifth and sixth amendments do not apply to trials conducted in consular courts, their guarantees apply to "citizens and others within the United States, or who are brought there for trial"); Wong Wing v. United States, 163 U.S. 228, 238, 16 S.Ct. 977, 981, 41 L.Ed. 140 (1896) (holding that "all persons within the territory of the United States are entitled to the protection guaranteed by [the fifth and sixth] amendments"); United States ex rel. Turner v. Williams, 194 U.S. 279, 291, 24 S.Ct. 719, 722 L.Ed. 979 (1904) (observing that fifth and sixth amendments protect aliens once they are in this country); Mathews v. Diaz, 426 U.S. 67, 77, 96 S.Ct. 1883, 1890, 48 L.Ed.2d 478 (1976) (explaining that all aliens within the jurisdiction of the United States enjoy

the protections of the fifth and sixth amendments and may not be invidiously discriminated against by the federal government). In other cases, the Court has considered specifically the constitutional protections enjoyed by illegal aliens. See, e.g., Plyler v. Doe, 457 U.S. 202, 211, 102 S.Ct. 2382, 2391, 72 L.Ed.2d 786 (1982) (holding that under the Equal Protection Clause of the fourteenth amendment, states may not discriminate against illegal aliens by withholding free public education; rejecting argument that illegal aliens are not within the jurisdiction of the states or the federal government and therefore are not entitled to equal protection rights). From these cases, we learn that aliens within the United States enjoy the benefits of the first, fifth, sixth and fourteenth amendments.

The questions we consider today is whether an alien, Verdugo-Urquidez, can claim benefits under the fourth amendment.

One argument against the application of the fourth amendment to Verdugo-Urquidez is that the language of this amendment is different from the language of the amendments that already have been found to protect aliens. For example, the first amendment broadly proscribes certain governmental conduct, while the fifth, sixth and fourteenth amendments prohibit certain acts, or provide certain rights, with respect to "persons." In a number of cases, the Court has remarked of these amendments that their "provisions are universal in their application." See, e.g., Yick Wo, 118 U.S. 369, 6 S.Ct. at 1070 (fourteenth amendment); Wong Wing, 163 U.S. At 238, 16 S.Ct. at 981 (fifth and sixth

amendments). The fourth amendment, in contrast protects " the people" against unreasonable searches. It provides:

> The right of the people to be secure in their persons, houses, papers, and effects, and against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.
>
> U.S. Const. amend. IV.

We do not read the phrase "The right of the people to be secure" as restricting the application of the fourth amendment to any special class of people. The language of the amendment does not so limit "people," and we will not insert qualifying language into the amendment to limit its application in such a fashion. In the present case, Verdugo-Urquidez, an alien in the custody of our government awaiting trial in our

country, seeks to assert the protection of the fourth amendment. He is not in this country "illegally;" he's here because our government wants him here to face criminal charges. He is being prosecuted for alleged violations of United States law in a United States court. We can discern no conceivable reason why he should be denied the protection of the fourth amendment in connection with this prosecution.

We find support for the proposition that illegal aliens have fourth amendment rights in statements which appear in Immigration & Naturalization Service v. Lopez-Mendoza, 468 U.S. 1032, 104 S.Ct. 3479, 82 L.Ed.2d 778 (1984) There, the court held that deportation hearings are not criminal proceedings, id. at 1038, 104 S.Ct. at 3483, and they are not appropriate proceedings in which to

apply the exclusionary rule. Id. at 1041-50, 104 S.Ct. at 3484-89. Significantly, in the final part of the Lopez-Mendoza decision, a plurality of the Court stated:

> We do not condone any violations of the Fourth Amendment that may have occurred in the arrests of respondents Lopez-Mendoza and Sandoval Sanchez. . . . Our conclusions concerning the exclusionary rule's value might change, if there developed good reason to believe that Fourth Amendment violations by INS officers were widespread.

Id. at 1050, 104 S.Ct. at 3489. And in their dissenting opinions, four other justices expressed the view that illegal aliens have fourth amendment rights. See id. at 1051, 104 S.Ct. 15 3490 (Brennan, J.) ("In this case, federal law enforcement officers arrested respondents . . . in violation of their Fourth Amendment rights."); id. at 1055, 104 S.Ct. at 3491 (White, J., joined in

pertinent part by Stevens, J.) (opining that fourth amendment violations often go unchallenged by illegal aliens because "once the Government has improperly obtained illegal evidence against an illegal alien, he is removed from the country"); id. at 1060, 104 S.Ct. at 3494 (Marshall, J.) (acknowledging the Lopez-Mendoza case, the Solicitor General of the United states conceded that illegal aliens have fourth amendment rights:

> The determinative question, therefore, is not whether the protections of the Fourth Amendment extend to deportable aliens discovered in this country -- a proposition we do not contest -- but whether it is appropriate to permit illegal aliens to invoke the exclusionary rule in civil deportation proceedings in order to perpetuate their unlawful presence in the United States.

Brief for Petitioner at 10-11, I.N.S. v. Lopez-Mendoza, 468 U.S. 1032, 104

S.Ct. 3479, 82 L.Ed.2d 778 (1984)(No. 83-491) (emphasis added).

Given that in Lopez-Mendoza eight of nine Supreme Court justices, as well as the Solicitor General, took the position that illegal aliens possess fourth amendment rights, it is difficult to conclude that Verdugo-Urquidez lacks these same protections. The Court has told us that all aliens, "[e]ven one whose presence in this country is unlawful, involuntary, or transitory," enjoy fifth and fourteenth amendment rights, see Mathews v. Diaz, 426 U.S. 67, 77, 96 S.Ct. 1883, 1890, 48 L.Ed.2d 478 (1976) (emphasis added), as well as sixth amendment rights, see Wong Wing, 163 U.S. at 238, 16 S.Ct. at 981. Consequently, it seems absurd to grant the protection of the fourth amendment to one whose presence in the country is voluntary

although illegal, and yet deny it to Verdugo-Urquidez, whose presence in the United States, although legal, is plainly involuntary. Verdugo-Urquidez was arrested by the United States government when he was delivered into its custody by the Mexican police, and then, with criminal charges against him in this country, the federal government searched his residence in Mexico solely to obtain evidence to be used against him in his criminal prosecution. It would be odd indeed to acknowledge that Verdugo-Urquidez is entitled to due process under the fifth amendment, and to a fair trial under the sixth amendment, both of which rights he is accorded under established constitutional jurisprudence, and deny him the protection from unreasonable searches and seizures afforded under the fourth amendment.[3]

We hold that Verdugo-Urquidez may challenge the government's search of his Mexicali residence under the fourth amendment. We now consider whether this search was a search by the federal government.

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[3]/ The dissent suggests that United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 57 S.Ct. 216, 81 L.Ed. 255 (1936), and Johnson v. Eisentrager, 339 U.S. 763, 70 S.Ct. 936, 94 L.Ed. 1255 (1950) should be considered in this analysis. See dissent at page 1240. We disagree.

The issues in Curtiss-Wright were whether Congress had improperly delegated its legislative powers to the president, whether a presidential proclamation had become effective, and if it had, whether persons charged with violations which occurred during the effective period of the proclamation could be prosecuted on an indictment brought after the president revoked the proclamation. Curtiss-Wright had nothing to do with the question whether the Constitution applies to aliens.

Johnson involved petitions for writs of habeas corpus filed in the United States District Court for the District of Columbia by enemy aliens imprisoned in Germany following their convictions

3. Determining When Government Acts Abroad

In Stonehill v. United States, 405 F.2d 738, 743 (9th Cir. 1968), cert. denied, 395 U.S. 960, 89 S.Ct. 2102, 23 L.Ed.2d 747 (1969), we observed

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[3]/cont. in China by a military commission. The aliens were German nationals who had continued to engage in military activities against the United States, in China, after Germany's unconditional surrender but while the war against Japan continued. In rejecting the enemy aliens' petition for habeas corpus, the Court stated: "We hold that the Constitution does not confer a right of personal security or an immunity from military trial and punishment upon an alien enemy engaged in the hostile service of a government at war with the United States." Johnson, 339 U.S. at 785, 70 S.Ct. at 947. The Court also distinguished cases in which constitutional protections had been extended to person other than American citizens who were in the United States:

> But, in extending constitutional protections beyond the citizenry, the Court has been at pains to point out that it was the alien's presence within its territorial jurisdiction that gave the Judiciary power to

that "[n]either the Fourth Amendment to the United States Constitution nor the exclusionary rule of evidence, designed to deter Federal officers from violating the Fourth Amendment, is applicable to

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[3]/cont.

act. In the pioneer case of Yick Wo v. Hopkins, the Court said of the Fourteenth Amendment, "These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; . . . ." 118 U.S.C. 356, 369 [6 S.Ct. 1064, 1070]. And in The Japanese Immigrant Case, the Court held its processes available to "an alien, who has entered the country, and has become subject in all respects to its jurisdiction, and a part of its population, although alleged to be illegally here." 189 U.S. 86, 101 [23 S.Ct. 611, 614-615, 47 L.Ed. 721 (1903)]. Johnson v. Eisentrager, 339 U.S. at 771, 70 S.Ct. at 940 (emphasis supplied by the Court in Johnson).

the acts of foreign officials." Id. at 743. Because the fourth amendment does not itself require exclusion of unlawfully obtained evidence, and because excluding reliable evidence will not force foreign officers to abide by the norms of the fourth amendment, the exclusionary rule has no application to searches conducted solely by a foreign government. Id. We explained, however, that "the Fourth Amendment could apply to raids by foreign officials . . . if Federal agents so substantially participated in the raids so as to convert them into joint ventures between the United States and foreign officials." Id.[4]

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[4]/ There is an independent corollary to the rule that the Constitution and the exclusionary rule do not apply to searches conducted by foreign police in their own country. In "a case where federal officials . . .

Since our decision in Stonehill, other circuit courts of appeals have addressed the "joint venture" doctrine, although not all circuits have phrased the analysis in the way we have. See, e.g.,

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[4]/cont. induce[] foreign police to engage in conduct that shock[s] the conscience," the district court may in the exercise of its supervisory power exclude the evidence. United States v. Maher, 645 F.2d 780, 783 (9th Cir. 1981) (quoting United States v. Birdsell, 346 F.2d 775, 782 n.10 (5th Cir.), Cert. denied, 382 U.S. 963, 86 S.Ct. 449, 15 L.Ed.2d 366 (1965)). Verdugo-Urquidez does not raise this ground to support suppression of the challenged evidence. Accordingly, we do not examine cases such as United States v. Toscanino, 550 F.2d 267 (2d Cir. 1974), which purported to use the "joint venture" analysis to exclude evidence, but which a later panel of the Second Circuit tells us is best understood as a case involving the suppression of evidence obtained by the federal government in conjunction with the brutal torture of a foreign national by foreign police. See United States ex rel. Lujan v. Gengler, 510 F.2d 62, 65-66 (2d Cir.), cert. denied, 421 U.S. 1001, 95 S.Ct. 2400, 44 L.Ed.2d 668 (1975).

United States v. Rosenthal, 793 F.2d 1214, 1231 (11th Cir.), modified, 801 F.2d 378 (1986), cert, denied, ___ U.S. ___, 107 S.Ct. 1377, 94 L.Ed.2d 692 (1987); United States v. Paternina-Vergara, 749 F2d 993, 998 (2d Cir. 1984), cert. denied, 469 U.S. 1217, 105 S.Ct. 1197, 84 L.Ed.2d 342 (1985); United States v. Hawkins, 661 F2d 436, 455-56 (5th Cir. Unit B Nov. 1981); United States v. Heller, 623 F.2d 594, 599-600 (5th Cir. 1980); United States v. Marzano, 537 F.2d 257, 269-71 (7th Cir. 1976), cert. denied, 429 U.S. 1038, 97 S.Ct. 734, 50 L.Ed.2d 749 (1977). The "joint venture" analysis also has been applied repeatedly by this court. See, e.g., United States v. Peterson, 812 F.2d 486, 490 (9th Cir. 1987); United States v. Benedict, 647 F.2d 928, 930-31 (9th Cir.), cert.

denied, 454 U.S. 1087, 102 S.Ct. 648, 70 L.Ed.2d 624 (1981); United States v. Maher, 645 F.2d 780, 782-83 (9th Cir. 1981); United States v. Rose, 570 F.2d 1358, 1361-62 (9th Cir. 1978). Notwithstanding the extensive discussion of the doctrine in the courts, however, it remains as true now as it was in 1976 when the Fifth Circuit observed:

> The few courts that have considered the question of how much American participation in a foreign search and seizure is required to mandate application of the exclusionary rule have not been unanimous in their choice of the precise test to be applied -- though they have as a statistical matter been virtually unanimous in rejecting claims of undue participation.

United states v. Morrow, 537 F.2d 120, 140 (5th Cir. 1976). Nevertheless, when we consider the facts of this case against the backdrop of prior cases, it is abundantly clear that the DEA's involvement in this search was so great

that no court could logically conclude anything other than that the search was an American operation from start to finish.

a. The Mexicali Search

Based on DEA Agent Terry Bowen's own investigation and surveillance in Mexico, and relying on reports by other DEA agents or confidential informants, Agent Bowen concluded that Verdugo-Urquidez's Mexicali house was his principal residence in Mexico. Agent Bowen also concluded from reports of confidential informants that Verdugo-Urquidez owned another house in San Felipe, Baja California, Mexico. Agent Bowen believed that a search of these houses would disclose cash proceeds of Verdugo-Urquidez's alleged narcotics transac-

tions, as well as relevant documentary evidence, including drug ledgers and address books identifying Verdugo-Urquidez's associates. Agent Bowen also hoped that the searches would disclose information pertaining to the Camarena murder investigation. The district court found that Agent Bowen's "express objective in conducting the . . . searches was to obtain evidence for use against Verdugo in the pending United States prosecution." [CR 384, 15 2-3]. The court also found that while Agent Bowen had participated in other searches in Mexico, in almost none of those cases had seized evidence subsequently been introduced against a defendant in a criminal trial. "Despite his inexperience with the use of such foreign seized evidence in a United States prosecution, Bowen did not discuss the searches with

anyone prior to making his decisions. Bowen alone made the decision to conduct the searches." [CR 384, at 3].

On January 24, 1986, Agent Bowen telephoned Walter White, the Assistant Special Agent in charge of DEA operations in Mexico. Agent Bowen and Special Agent White discussed the arrest of Verudgo-Urquidez and Agent Bowen's interest in searching the Mexicali and San Felipe residences. Agent Bowen asked Special Agent White to contact Florentino Ventura, the Director General of the Mexican Federal Judicial Police (MFJP), and ask him to authorize the search and instruct the local MFJP commandante to cooperate with the DEA. Special Agent White did not ask Agent Bowen whether the approval of the Justice Department had been sought or obtained, although he agreed to contact Director Ventura.

After their conversations, Special Agent White unsuccessfully attempted to reach Ortega Padilla, the Second Deputy Attorney General for the Republic of Mexico, and Director Ventura. The next morning, Special Agent White reached Director Ventura and explained to him that DEA agents in Calexico believed Verdugo-Urquidez's Mexican residences contained evidence relevant to a pending criminal prosecution and wanted permission to search. Director Ventura agreed to authorize the search. He told Special Agent White that Agent Bowen should inform the local MFJP commandante in Mexicali that permission for the searches had been received and that the MFJP officers were to cooperate.

At approximately 1:00 p.m. on January 25, 1986, Special Agent White called Agent Bowen and gave him the go-ahead

for the search. Agent Bowen already had assembled a team of three other DEA officers, all of whom knew that Verdugo-Urquidez had been arrested and that he also was a suspect in the Camarena case. Agent Bowen instructed his officers that they were to seize any documentary evidence relevant to Verdugo-Urquidez's alleged narcotics activities. After receiving Special Agent White's phone call, the four DEA officers drove to the MFJP office in Mexicali, Mexico. Agent Bowen then met with the local MFJP commandante, Enrique Salazar-Ramos, and informed him of Verdugo-Urquidez's arrest and that Director Ventura had authorized the searches "and stated that the local MFJP officers were to assist the DEA agents in conducting the searches." [CR 384, at 5]. Commandante Salazar verified Agent Bowen's statements by

placing a phone call, apparently to one of the commandante's superior officers. After assuring the DEA agents that "everything was fine," Commandante Salazar said that he wanted to check with the "delegado," the official representative of the Mexican Attorney General in Mexicali. Shortly thereafter, the commandante returned and agreed to help in the search. Before leaving the MFJP office, Commandante Salazar told the DEA agents that they would be permitted to take back to the United States any documentary items they found.

With a team of between ten and fifteen MFJP officers, the DEA agents and Commandante Salazar drove to the Mexicali residence, arriving there after dark. Commandante Salazar stationed some of his officers around the perimeter of the house and, while the DEA agents

waited in the street, an entry team composed entirely of MFJP officers entered the house. While the MFJP officers conducted a security sweep, the DEA agents entered the house but they did not search the house at this time.

Because it was already late and because San Felipe was two hours away, Commandante Salazar and Agent Bowen decided to drive there and search the San Felipe house first. The commandante left behind a force of four or five officers who were instructed to secure the Mexicali residence, but who were told not to search it until he and the DEA agents returned. The DEA and the remaining MFJP officers then drove to San Felipe, where they searched Verudgo-Urquidez's San Felipe residence. The district court found that most of the MFJP officers stood a perimeter watch

while the DEA agents searched the house over a two-hour period. The court found that "the DEA agents actively participated in the search itself, both in terms of actually looking for relevant documentary items and identifying as relevant those documentary items discovered by MFJP officers." [CR 384, at 7]. During this search, the items were segregated depending upon which agency seized them. At the conclusion of the search, which occurred some time before midnight, seized items were turned over to the DEA agents. The MFJP officers seized several weapons, as well as a 1984 Grand Marquis and some other motor vehicles. Neither the MFJP nor the DEA left a receipt or inventory identifying the seized items.

The commandante and the DEA then returned to the Mexicali residence, arriving about two hours after leaving San

Felipe. The district court found that Commandante Salazar, at least two or three MFJP officers, and three of the four DEA agents conducted a room-by-room search of the Mexicali house. The DEA agents seized evidence thought relevant, while the MFJP officers brought documents they found to Agent Bowen, who decided whether the DEA wanted them. Again, the seized items were segregated based on which agency found them, although all the seized documents were placed in the DEA agents' case. And, as in the San Felipe search, the MFJP kept all weapons they found.

At around 3:00 or 4:00 a.m., Commandante Salazar grew tired of the search, which at that time was being conducted by Agent Bowen, who was sorting through several files found in a cabinet kept in the back portion of the

house. The commandante placed all the remaining documents in a briefcase and handed the briefcase to Agent Bowen. Commandante Salazar told Agent Bowen to take all the documents and sort through them later because it was late and he wanted the search to end. Agent Bowen placed the briefcase in the DEA's car, and the MFJP and DEA agents left the Mexicali house. The DEA agents then returned to the United States with the seized documents. Once back in the United States, the DEA agents prepared inventories and written reports identifying the seized documents. Of the seized evidence, the government sought only to introduce a tally sheet found during the search of the Mexicali residence. The tally sheet purportedly reflects the quantities of marijuana smuggled by Verdugo-Urquidez into the United States.

b. Analysis of Mexicali Search

Based on the facts found by the district court, which the government does not contend are clearly erroneous, we conclude the searches of the Mexicali and San Felipe residences were American searches to which the fourth amendment applies. Indeed, given the high degree of American involvement in the searches and the low degree of Mexican interest in Verdugo-Urquidez, we do not even find the question a close one.

This is not a case in which United States agents merely supplied a tip to a foreign law enforcement agency, which then conducted an investigation and made a search or arrest leading to an American prosecution. See, e.g., United States v. Hawkins, 661 F.2d 436, 455-56 (5th Cir. Unit B Nov. 1981); United States v. Heller, 625 F.2d 594, 600

(5th Cir. 1980). Neither is this a case in which a foreign government invited American agents to observe an arrest or a search of interest to both countries. See, e.g., United States v. Rosenthal, 793 F.2d 1214, 1231 (11th Cir.), modified, 801 F.2d 378 (1986), cert. denied, ___ U.S. ___, 107 S.Ct. 1377, 94 L.Ed.2d 692 (1987); United States v. Benedict, 647 F.2d 928, 930-31 (9th Cir.), cert. denied, 454 U.S. 1087, 102 S.Ct. 648, 70 L.Ed.2d 624 (1981). This also is not a case illustrating legitimate international law enforcement cooperation in which American or foreign law enforcement officials contacted their counterparts in other countries to plan a joint operation in which the American involvement is minimal. See, e.g., United States v. Maher, 645 F.2d 780, 783 (9th Cir.

1981); United States v. Morrow, 537 F.2d 120, 139-40 (5th Cir. 1976). Finally, this is not a case in which we must decide whether American law enforcement officials induced their foreign counterparts to conduct a search in order for the American agents to circumvent the fourth amendment. See, e.g., United States v. Paternina-Vergara, 749 F.2d 993, 998 (2d Cir. 1984), cert. denied, 469 U.S. 1217, 105 S.Ct. 1197, 84 L.Ed.2d 342 (1985); United States v. Hawkins, 661 F.2d 436, 456 (5th Cir. Unit B Nov. 1981).

The present case is similar to two other cases in which a "joint venture" has been found. In United States v. Emery, 591 F.2d 1266 (9th Cir. 1978), a "joint venture" was found because the DEA tipped the Mexican authorities to a possible smuggling transaction to take

place in Mexico. The DEA, however, also planted an undercover operative with the suspected narcotics trafficker. Moreover, the DEA coordinated the surveillance of the suspected site of the transaction, and gave the prearranged signal for the Mexican police to move in and make the arrest. Id. at 1267. Similarly, in United States v. Peterson, 812 F.2d 486 (9th Cir. 1987), a "joint venture" between the DEA and the Phillipine authorities was found because the DEA's role was not subordinate to that of the Phillipine police. Id. at 490.

The present case falls within the scope of this "joint venture" doctrine. Indeed, many of the facts in this case are precisely those found to be lacking in our seminal Stonehill decision, which explained the doctrine we are now

applying. Here, it was the American authorities who planned and instigated the searches to secure evidence to be used in an American trial; there was no existing Mexican investigation of Verdugo-Urquidez then under way. But see Stonehill v. United States, 405 F.2d 738, 646 (9th Cir. 1968); cert. denied, 395 U.S. 960, 89 S.Ct. 2102, 23 L.Ed.2d 747 (1969). Second, the activities of the DEA took place before, during and after the search. But see id. Third, before the search began the MFJP informed the DEA that they could keep all evidence seized during the search. But see id. Fourth, it was the DEA who took the initiative in ensuring the search took place soon after Verdugo-Urquidez's arrest. But see id. Finally, when the DEA contacted the MFJP about the search, they were not

only seeking assistance from the Mexican police, they were asking for permission to run their own operation. It was Agent Bowen who specified which documents were the objects of the search. The MFJP officers brought the documents they found to Agent Bowen for him to evaluate their relevance to his objectives. All the seized documents were kept by the DEA. Indeed, the MFJP's interest in the search was so minimal that when the commandante grew tired, he simply placed all unsorted documents into a single briefcase and gave the briefcase to Agent Bowen. In short, it is clear that the DEA controlled the operation.

4. Fourth Amendment Requirements

Having determined that the fourth

amendment applies to the DEA's search of the Mexicali residence, we must answer the question: "What does the fourth amendment require in this case?" The government invites us to hold that the DEA agents relied in good faith on the assurances of Mexican government officials that the search was permissible under Mexican law, and, therefore, under United States v. Peterson, 812 F.2d 486 (9th Cir. 1987), the evidence obtained in the search should not be suppressed. We decline to do so.

In Peterson, DEA agents participated in a joint operation to tap a telephone at the defendant's apartment in the Philippines. Information obtained from the wiretap permitted the Coast Guard to locate a ship loaded with marijuana. The Coast Guard stopped the ship on the

high seas, boarded it, searched it and seized the marijuana. We stated:

> Assuming that this was a stop and a search for criminal violations at the outset, and that fourth amendment protections are fully applicable, a point that is far from settled, there was probable cause to search and seize the vessel, its cargo, and its crew. Searches of vessels on the high seas in such circumstances may be warrantless, as the location of the vessels and the practical difficulties of obtaining a warrant while at sea present exigent circumstances under well-accepted principles. We find, therefore, no constitutional or other invalidity in the stop, the board, the search, or the seizure of the evidence in this case.

Id. at 494 (internal citations omitted).

The warrantless search of the vessel in Peterson was permissible due to exigent circumstances inherent in a high seas search. See id. We assumed that the earlier telephone tap in the Philippines violated Philippine law "and was, as a result, not reasonable under the fourth amendment." Id. at 491. We

determined, however, that the DEA officers could rely in good faith on the assurances given them by Philippine officials that the telephone tap was legal under Philippine law. This good faith reliance removed the taint from the violation of Philippine law so that the search of the vessel, valid in its own right, was not rendered illegal under the fourth amendment. See id. at 492.

In the present case, the parties dispute whether the search violated Mexican law. We do not decide this question. Nor do we assume that Mexican law was or was not violated, or what effect a violation of Mexican law would have on the question of the validity of the search under the fourth amendment. What we do decide is the question we are presented: Did the search of Verdugo-

Urquidez's Mexicali residence violate the fourth amendment? If it did, whether it also may have violated Mexican law is irrelevant.

The fourth amendment does not prohibit all searches, only unreasonable searches. Two requirements typically follow from this proposition. First, "searches and seizures must be supported by probable cause" to be valid. See United States v. Winsor, 846 F.2d 1569, 1575 (9th Cir. 1988)(en banc). Second, as the Supreme Court repeatedly has emphasized, "a cardinal principle of the fourth amendment is that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable.'" Mincey v. Arizona, 437 U.S. 385, 390, 98 S.Ct. 2408, 2412, 57 L.Ed.2d 290 (1978) (quoting Katz v. United States,

389 U.S. 347, 357, 88 S.Ct. 507, 514, 19 L.Ed.2d (1967)). Thus, in most cases, a search is per se unreasonable if the police do not obtain a warrant, which a magistrate or judge finds to be supported by probable cause.

In the context of the fourth amendment, the Court has carved out "a few specifically established and well-delineated exceptions" to the warrant requirement. Mincey, 437 U.S. at 390, 98 S.Ct. at 2412 (quoting Katz, 389 U.S. at 357, 88 S.Ct. at 514). In other cases, the Court has carved out exceptions to the "probable cause" requirement. See United States v. Winsor, 846 F.2d at 1576-77 (collecting and discussing cases). In the present case, the DEA searched Verdugo-Urquidez's residence. "[T]he Fourth Amendment has drawn a firm line at the entrance to the

house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant." Steagald v. United States, 451 U.S. 204, 212, 101 S.Ct. 1642, 1647, 68 L.Ed.2d 38 (1981) (internal quotation marks and citations omitted). Exigent circumstances were not present in this case. We must decide, therefore, whether the DEA should have obtained a warrant before conducting the search.

The warrant requirement serves to interpose a "neutral and detached magistrate" between the public and the police officer, who is "engaged in the often competitive enterprise of ferreting out crime." Coolidge v. New Hampshire, 403 U.S. 443, 449, 91 S.Ct. 2022, 2029, 20 L.Ed.2d 564 (1971)(quoting Johnson v. United States, 333 U.S. 10, 14, 68 S.Ct. 367, 369, 92 L.Ed. 436 (1948)).

The magistrate's independent evaluation of whether law enforcement officials have probable cause to search assures that constitutional freedoms are not infringed by zealous law enforcement efforts. See, e.g., id. at 450, 91 S.Ct. at 2029 ("[T]he whole point of the basic rule . . . is that prosecutors and policemen simply cannot be asked to maintain the requisite neutrality with regard to their own investigations."); see also Steagald, 451 U.S. at 213, 101 S.Ct. at 1648. In the present case, however, a warrant issued by an American magistrate would be a dead letter in Mexico. As the district court itself recognized, "a United States warrant, in itself, cannot give United States officers the authority to enter a foreign residence and conduct a search." [CR 384, at 16]. International law enforce-

ment is a cooperative venture and it would be an affront to a foreign country's sovereignty if the DEA presented an American warrant and suggested that it gave the American agents all the authority they needed to search a foreign residence.

Notwithstanding this geographic limitation, we cannot relieve the government from its obligation to obtain a search warrant simply because the place to be searched by the government is outside this country. To do so would be to treat foreign searches differently from domestic searches just because they are foreign. If the constitutional protection of the fourth amendment applies to our government's search of the Mexicali residence, as we have held it does, there is no justification to amputate from the body of that protection the

appendage that requires a detached magistrate's advance determination of probable cause and the issuance of a warrant. If the residence were located in the United States, we would conclude that the evidence sought to be introduced in this case would have to be suppressed because the government did not obtain a warrant and no exigent circumstances existed. We can discern no logical reason to formulate a different rule just because the residence to be searched happens to be in Mexico. True, an American search warrant would be of no legal validity in Mexico, but it would have substantial constitutional value in this country. And it is in this cournty that Verdugo-Urquidez is being prosecuted for alleged violations of United States law. A warrant issued by a detached magistrate here would

reflect the magistrate's determination that probable cause to search existed. It also would define the scope of the search. These constitutional protections are afforded by the warrant requirement; they are not affected by whether or not a foreign government would give legal effect to the warrant.

We conclude that the protection of the fourth amendment extends to the government's search of the Mexicali residence. Since the DEA obtained no warrant to make that search, and because exigent circumstances were lacking, the search was unlawful under the fourth amendment. Accordingly, the evidence obtained in that search was properly suppressed.

AFFIRMED.

WALLACE, Circuit Judge, dissenting:

In holding that the fourth amendment applies to a foreign search of a foreign nation's residence, the majority fails to mention, much less attempt to explain, the Supreme Court's seemingly unequivocal pronouncement that "[n]either the Constitution nor the laws passed in pursuance of it have any force in foreign territory unless in respect of our own citizens." United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 318, 57 S.Ct. 216, 220, 81 L.Ed. 255 (1936) (Curtiss-Wright).

Verdugo is not an American citizen. He does not reside in the United States. The search in this case occurred in a foreign country. Yet the majority concludes that Verdugo, a Mexican citizen

residing in Mexico, is entitled to invoke the fourth amendment to suppress evidence obtained in a search that occurred on Mexican soil. That a nonresident alien has any reasonable expectation of privacy in his foreign country with respect to our government is so startling a proposition to me that, even if the Supreme Court had not written Curtiss-Wright, it would be difficult for me to accept such an illogical proposition in the absence of compelling precedent or sound reasoning. The majority, however, provides us with neither.

The reasoning by which the majority reaches this result is severely flawed. From one line of Supreme Court cases establishing that American citizens have constitutional rights abroad and another line holding that aliens in the United States are entitled to constitu-

tional safeguards against certain actions taken by our officials in this country, the majority, without explanation, arrives at the conclusion that a foreign national residing in a foreign country is entitled to fourth amendment rights against actions taken by our officials on foreign soil. The majority's leap in logic is not just a non sequitur; it also ignores the self-imposed limitations on the geographic reach of the Constitution -- limitations that have been endorsed by the Supreme Court.

I

Because there is no direct Supreme Court precedent, I agree with the majority that we must inform our judgment by the language of the Constitution, its history, and by Supreme Court cases

dealing with the constitutional rights of aliens in analogous contexts. But upon examining the text and history of the Constitution and applying the guiding principles that I have deduced from the Supreme Court precedents, I am convinced that the fourth amendment does not apply to a search in Mexico of property belonging to a Mexican citizen whose permanent residence is in Mexico.

A.

My inquiry begins with the language of the Constitution itself. By ratifying the Constitution, the people of the United States created a limited national government. The government was to possess only those powers that the people chose to confer upon it. This notion of governmental power derived from the people is evident in the Preamble to the Constitution: "We The People Of The United States . . . do ordain and establish this Constitution for the United States of America." While many believed that this limited grant of power to the national government carried with it the implied reservation of certain fundamental rights of the individual, others demanded a Bill of Rights that would expressly forbid to the federal government the power to encroach upon these rights.

Among these basic rights is the right to be free from unreasonable searches and seizures by the government. To this end, the fourth amendment provides that:

> The right of the people to be secure in their persons, houses, papers, and effects, against unrea

> sonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

By its express terms, the rights set forth in this amendment are secured to "the people." Who "the people" are must be found by reading the amendment in the context of the entire document. In doing so, it appears that "the people" referred to in the amendment are "The People" in the Preamble who endowed the federal government with certain limited, enumerated powers. Only an unduly strained reading of the fourth amendment's "the people" could lead to any other conclusion. Because "The People" in the fourth amendment are only "The People of the United States," it follows that the fourth amendment extends its protective blanket to Verdugo only if he

may properly be considered one of <u>the people of the United States</u>.

B.

My conclusion that the fourth amendment protects only the people of the United States is supported by an examination of our constitutional history, which indicates that the Constitution was conceived as a "compact" or "social contract" among the people of the United States. In our pre-constitutional era, the "compact" or "social contract" concept of government pervaded American political philosophy, both in theory and in practice. For example, in 1620 Pilgrims entered into the Mayflower Compact, in which they proclaimed that "[w]e . . . solemnly and mutually . . . covenant and combine ourselves together into a civil Body Politick, for our

better Ordering and Preservation." Mayflower Compact, November 11, 1620, reprinted in Sources of Our Liberties: Documentary Origins of Individual Liberties in the United States Constitution and Bill of Rights 60 (R. Perry ed. 1959)(hereinafter "Sources of Our Liberties")). Less than a score of years later, in 1639, the residents of Connecticut formally established by mutual agreement a government by ratifying the Fundamental Orders of Connecticut. Sources of Our Liberties, at 115; A. Kelly & W. Harbison, The American Constitution: Its Origins and Development 94 (ed. 1963) (hereinafter A. Kelly & W. Harbison).

Prevalent during the period leading to the American Revolution was the recurrent notion that a government was created by a compact among those governed and

that the government could not infringe certain rights of those empowering it. John Locke, one of the most influential political philosophers of the time, conceived of government as a social compact in which formerly free individuals united to establish communities. In order to protect what he considered to be a person's most essential liberties, Locke believed it was necessary that each person surrender some part of his or her natural independence. See J. Kettner, The Development of American Citizenship, 1608-1870 44 (1978). Of particular relevance to the revolutionary sentiment that was mounting at the time was Locke's vision of revolution as an act that undid all existing political compacts, thereby leaving the people free to enter willingly into a new polit-

ical compact. A. Kelly & W. Harbison at 94.

Angered by the treatment of the American Colonies by England, in 1774 the Continental Congress petitioned the Crown for redress of grievances. In its Declaration and Resolves, the Continental Congress proclaimed its belief that the colonists were entitled to basic civil liberties by virtue of natural law, English constitutional principles, and their "several charters or compacts." Continental Congress, Declaration and Resolves, October 14, 1774, represented in the The Founders' Constitution, 2 (P. Kurland & R. Lerner ed. 1987). As Alexander Hamilton stated:

> [T]he origin of all civil government, justly established, must be a voluntary compact between the rulers and the ruled, and must be liable to such limitations as are necessary for the security of the absolute rights of the latter.

A. Hamilton, The Farmer Refuted, February 23, 1775, in The Founders' Constitution at 91. When the leaders of the American colonies finally proclaimed their separation from English sovereignty in the Declaration of Independence, they declared that in order to secure certain inalienable rights, "governments are instituted among men, deriving their just powers from the consent of the governed." Declaration of Independence, July 4, 1776, in Sources of Our Liberties at 319.

After the American Revolution, the American people continued to envisage government as a voluntary compact between the people of each sovereign state. For example, in the Preamble to the Massachusetts Constitution of 1780, the people of that state expressly pro-

claimed their new government to be a compact among those governed:

> The body politic is formed by a voluntary association of individuals; it is a social compact, by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good.

Constitution of Massachusetts, October 29, 1780, in Sources of Our Liberties at 373.

Examining the Constitutional Convention against this background, it is not surprising that when the Framers set about the task of drafting the Constitution of the United States, they conceived of it as a "compact" or "social contract." See A. Kelly & W. Harbison at 165. Moreover, implicit in their understanding that the Constitution would be a compact was the realization that correlative rights and obligations

would govern relations between the people and their newly-created national government. In return of certain guarantees restricting the scope of government, the people of the states ceded to a central authority limited powers of government. On this point, the cover letter transmitting the Constitution and signed by George Washington is telling:

> It is obviously impracticable in the federal government of these states, to secure to all rights of independent sovereignty to each, and yet provide for the interest and safety of all: Individuals entering into society must give up a share of liberty to preserve the rest. . . . [T]he Constitution, which we now present, is the result of a spirit of amity, and of that mutual deference and concession, which the peculiarity of our political situation rendered indispensable.

Sources of Our liberties at 418.

Hence, it appears that the Framers understood that the social compact embodied in the Constitution necessarily required

that the people give up some degree of liberty in order for them to secure others in return.

Because the social compact theory of the Constitution contemplates that each individual will give up a share of liberty to preserve the rest, I believe that the majority errs in suggesting that the compact theory is undermined by the presence of the theory which emphasizes the "natural rights" of men. Maj. op. at 13-15. Viewing the compact and natural rights paradigms as mutually exclusive misperceives the interrelationship between these two. As can be seen from the majority's historical citations, the natural rights theory was usually espoused in documents declaring independence or rights. Taken in context, there is no conflict. While the Framers may have understood the liberties enumer-

ated in the Bill of Rights to reflect man's "natural rights," they also recognized that the Constitution embodies a compact among the People of the United States to sacrifice some modicum of these "natural rights" in order to create a central government capable of preserving the rest. See Sources of Our Liberties at 418. Thus, rather than coexisting in tension with the compact theory, the "natural rights" theory fits comfortably into its central tenet.

C.

A number of fundamental axioms can be deduced from the Constitution's regime of reciprocal rights and obligations. Chief among these is that one can make no claim of entitlement to rights without also assuming correspond-

ing obligations. No one can seriously doubt that the compact applies only to the people who empowered the government of the United States for the benefit of themselves and their posterity, not to other peoples of the world who neither ceded authority to it in exchange for certain guarantees of liberty nor otherwise consented to its rule.

These axioms find support in an unbroken line of Supreme Court cases reflecting the understanding of the Constitution as a compact between the people of the United States and its government. In Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 1 L.Ed 440 (1793), Chief Justice Jay observed that every state constitution "is a compact . . . and the Constitution of the United States is likewise a compact made by the people of the United States to govern themselves."

Id. at 471. Similarly, in McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 4 L.Ed. 579 (1819), Chief Justice Marshall proclaimed that "[t]he government of the Union . . . is, emphatically and truly, a government of the people. . . . [i]t emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit." (Emphasis added.) In League v. De Young, 52 U.S. (11 How.) 185, 203, 13 L.Ed. 657 (1850), the Supreme Court recognized that "[t]he Constitution of the United States was made by, and for the protection of, the people of the United States." (Emphasis added.) While the majority is correct in observing that these cases dealt with issues of federalism, rather than the extraterritorial reach of the constitution, it is nonetheless true that in these cases

the Supreme Court placed its imprimatur on the general notion that the Constitution is a compact made by The People of the United States for their own benefit and protection.

In later cases, the Court reasoned that because the government was "ordained and established for the United States of America, and not for countries outside of [its] limits, . . . [t]he Constitution can have no operation in another country." In re Ross, 140 U.S. 453, 464, 11 S.Ct. 897, 900, 35 L.Ed. 581 (1891). Applying this rule, the Court rejected the claim that an American citizen being tried abroad in a consular court was entitled to the Constitution's grand jury and petit jury guarantees. According to this restrictive view of the Constitution's reach, not even American citizens could invoke

its guarantees outside the territorial limits of the union. See also Downes v. Bidwell, 182 U.S. 244, 270-71, 21 S.Ct. 770, 780, 45 L.Ed. 1088 (1901)(the Constitution does not apply to foreign countries or to trials conducted therein).

The majority's insistence that Ross actually supports Verdugo's position evinces its failure to understand a critical distinction regarding the geographic limits of an alien's constitutional rights. Ross does not answer whether Verdugo was entitled to suppress on fourth amendment grounds the evidence seized from his Mexicali residence. As I will explain later in Part II.B., just because a foreign national may be entitled to fifth and sixth amendment rights during the charging and trial process does not shed light on whether he is

endowed with extraterritorial fourth amendment rights. Indeed, both reason and precedent justify extending fifth and sixth amendment trial-related rights to a nonresident alien while, at the same time, denying such an alien extra-territorial fourth amendment rights.

The foregoing cases reflect an understanding of the Constitution as a blanket of protections covering only the "people" who endowed their government with its powers and who remain physically present within the borders of the nation. Since these early decisions, however, both the Supreme Court and the circuit courts have expanded the territorial reach of the Constitution, including the protections of the Bill of Rights, to Americans abroad. Reid v. Covert, 354 U.S. 1, 5-14, 77 S.Ct. 1222, 1224-29, i L.Ed.2d 1148 (1957)

(Reid); see also United States v. Emery, 591 F.2d 1266, 1267-68 (9th Cir. 1978) (Miranda rights); United States v. Rose, 570 F.2d 1358, 1362 (9th Cir. 1978) (fourth amendment); United States v. Conroy, 589 F.2d 1258, 1264 (5th Cir.)(fourth amendment), cert. denied, 444 U.S. 831, 100 S.Ct. 60, 62 L.Ed.2d 40 (1979). Reid rested upon the view that "[w]hen the government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights . . . provide[s] to protect his life and property should not be stripped away just because he happens to be in another land." Reid, 354 U.S. at 6, 77 S.Ct. at 1225 (emphasis added). In addition, recent cases reveal that certain aliens within our borders can also be considered "people of the United States." See Kwong Hai Chew v. Colding, 344 U.S.

590, 596, 601, 73 S.Ct. 472, 479, 97 L.Ed. 576 (1953) (Kwong Hai Chew) (holding that a resident alien is a "person" within the meaning and protection of the fifth amendment). Both resident and illegal aliens are entitled to a wide range of constitutional protections while in this country. See, e.g., Plyler v. Doe, 457 U.S. 202, 210, 102 S.Ct. 2382, 2391, 72 L.Ed.2d 786 (1982) (illegal aliens may claim equal protection rights because these pertain to "any person within a state's jurisdiction"); Hamilton v. Mow Sun Wong, 426 U.S. 88, 96 S.Ct. 1895, 48 L.Ed.2d 495 (1976); Au Yi Law v. INS, 445 F.2d 217, 223 (D.C.Cir.) (aliens in this country are sheltered by the fourth amendment), cert. denied, 404 U.S. 864, 92 S.Ct. 64, 30 L.Ed.2d 108 (1971); Wong Wing v. United States, 163 U.S.

228, 237-38, 16 S.Ct. 977, 980-1, 41 L.Ed. 140 (1896) (Wong Wing) (aliens may invoke fifth and sixth amendments); Yick Wo v. Hopkins, 118 U.S. 356, 369, 6 S.Ct. 1064, 1070, 30 L.Ed. 220 (1886) (fourth amendment is not confined to the protection of citizens).

These cases reveal that "the people of the United States" include American citizens at home and abroad and aliens within our country's borders who are victims of actions taken in the United States by American officials. The Supreme Court, however, has never held that the Bill of Rights protects foreign nationals residing abroad from actions taken abroad by our officials. Hence, the majority paints with too broad a brush when it deduces that "[t]he Constitution imposes substantive contraints on the federal government, even when it

operates abroad." Maj. op. at 1218. This sweeping statement pretermits the crucial caveat that the extraterritorial effect of the Constitution has never been extended by the Supreme Court to persons other than American citizens. Predictably, the majority fails to cite a single Supreme Court case suggesting that the Constitution limits government action against foreign nationals in territory under foreign dominion. Neither Reid nor Balzac v. Puerto Rico, 258 U.S. 298, 312-13, 42 S.Ct. 343, 348, 66 L.Ed. 627 (1922) (Balzac), the two cases relied upon by the majority, support such a strained reading of the Constitution's extraterritorial scope. Reid speaks only of the extraterritorial rights of American citizens. See 354 U.S. at 6, 77 S.Ct. at 1225. Balzac contrary to the majority's assertion,

does not adopt "a more expansive vision" of the Constitution's extraterritorial force. In that case, the Supreme Court simply recognized the elementary proposition that in territories where the United States is sovereign, the Constitution is in force. See Balzac, 258 U.S. at 312-13, 42 S.Ct. at 348. How Balzac is relevant to the instant case thus escapes me. The complained of search in this case did not occur in a territory under the sovereign power of the United States. Rather, it occurred in Mexico under the sovereign power of the Mexican government. Thus stripped of all its case support, the majority's broad reading of the Constitution's extraterritorial reach finds support only in citations to academic literature. Law review articles, however, are not the law.

Extending the protective veil of the Constitution to constrain the actions taken by our agents abroad against foreign nationals residing in foreign territory would be entirely inconsistent with the view that the Constitution embodies a contract between the people of the United States and its government. On the contrary, as I observed at the beginning of my dissent, the Supreme Court has explicitly declared that "[n]either the Constitution nor the laws passed in pursuance of it have any force in foreign territory unless in respect of our own citizens." Curtiss-Wright, 299 U.S. at 318, 57 S.Ct. at 220. Consistent with this principle, the Supreme Court has long recognized that aliens who are beyond the territorial limits of the United States stand on a different constitutional footing than those residing

either permanently or temporarily within our borders. For instance, while the Court has recognized in the immigration context that "an alien who has entered the country, and has become subject in all respects to its jurisdiction, and a part of its population" is entitled to due process under the fifth amendment, The Japanese Immigrant Case, 189 U.S. 86, 101, 23 S.Ct. 611, 614, 47 L.Ed. 721 (1903), aliens who have not yet entered our borders are accorded only that degree of process provided by "the decisions of executive or administrative officers, acting within powers expressly conferred by Congress." Nishimura Ekiu v. United States, 142 U.S. 651, 660, 12 S.Ct. 336, 339, 35 L.Ed. 1146 (1892). Congress may, in fact, "exclude [an alien] in the first instance for whatever reason it sees fit," because "an

alien obviously brings with him no constitutional rights." Bridges v. Wixon, 326 U.S. 135, 161, 65 S.Ct. 1443, 1455, 89 L.Ed. 2103 (1945) (Murphy, J., concurring); see also United States ex rel. Turner v. Williams, 194 U.S. 279, 292, 24 S.Ct. 179, 723, 48 L.Ed. 979 (1904) (Turner) (an alien attempting to enter this country illegally is not one of the people to whom first amendment rights are secured).

An uninterrupted line of cases reaffirms to the present day this distinction between the constitutional rights of excludable aliens, those seeking admission into the United States, and deportable aliens, those already within the United States. See, e.g., Landon v. Plasencia, 459 U.S. 21, 32, 103 S.Ct. 321, 329, 74 L.Ed.2d 21 (1982) (Plasencia); Leng May Ma v. Barber,

357 U.S. 185, 187, 78 S.Ct. 1072, 1073, 2 L.Ed.2d 1246 (1958); Kwong Hai Chew, 344 U.S. at 600, 73 S.Ct. at 479) ("'excludable' aliens . . . are not within the protections of the Fifth Amendment"). Moreover, the Court in Kwong Hai Chew, quoting an earlier decision, carefully reminded us that "in extending constitutional protections beyond the citizenry, the Court has been at pains to point out that it was the alien's presence within its territorial jurisdiction that gave the Judiciary power to act." 344 U.S. at 596-97 n. 5, 73 S.Ct. at 477 n.5, quoting Johnson v. Eisentrager, 339 U.S. 763, 770-71, 70 S.Ct. 936, 940, 94 L.Ed. 1255 (1950) (Johnson) (holding that nonresident enemy aliens who had never been in the United States were not entitled to constitutional protections). It is, there-

fore, clear that our Bill of Rights distinguishes between resident and non-resident aliens. See Kwong Hai Chew, 344 U.S. at 596, 73 S.Ct. at 477 (a permanent resident is a person within the meaning of the fifth amendment).

The significance of residency within the United States to the question of the constitutional rights of aliens crystalizes when considered in the context of the compact theory. In discussing the greater rights that attach as one progresses from the status of a nonresident alien to a permanent resident alien to a naturalized citizen, the Court in Johnson implicitly recognized that as the concomitant to assuming ever-increasing obligations to the United States, one receives correspondingly greater rights. 339 U.s. at 769-71, 70 S.Ct. at 939-40. By voluntarily establishing residency within the United States, whether temporarily or permanently, aliens owe a local and temporary allegiance to the United States during the period of their residency. See Carlisle v. United States, 83 U.S. (16 Wall.) 147, 154, 21 L.Ed 426 (1873). As a consequence of this obligation of allegiance, aliens are entitled to many of the same rights as citizens. See Johnson, 339 U.S. at 770, 70 S.Ct. at 939. These rights, as I pointed out earlier, increase as an alien develops increasingly greater ties that evidence an intent to make the United States his permanent residence. See id.; Plasencia, 459 U.S. at 32 103 S.Ct. at 329.

An alien who chooses to establish his residency in the United States, however, like any citizen, pays a price for these

rights over and beyond the exaction of his temporary allegiance. In return for these constitutional guarantees, aliens must assume certain duties and obligations. Indeed, in Eisler v. United States, 170 F.2d 273 (D.C. Cir 1948) (Eisler), cert. dismissed, 338 U.S. 883, 70 S.Ct. 181, 94 L.Ed 542 (1949), the District of Columbia Circuit explicitly recognized the reciprocal nature of the rights and obligations of aliens residing in the United States:

> Once an alien lawfully enters and resides in this country he becomes invested with the rights, except those incidental to citizenship, guaranteed by the Constitution to all people within our borders. Correlatively, an alien owes a temporary allegiance to the Government of the United States, and he assumes duties and obligations which do not differ materially from those of native-born or naturalized citizens. . . .

Id. at 279 (citation omitted). Thus, not only do resident aliens owe a duty

of allegiance to the United States, but they are bound to obey all laws of the United States other than those related to citizenship, Radich v. Hutchins, 95 U.S. 210, 211, 24 L.Ed. 409 (1877), contribute to the support of government, and even be called to serve in the national defense. See Esiler, 170 F.2d at 279; Leonhard v. Eley, 151 F.2d 409, 410 (10th Cir. 1945); Military Selective Service Act, 50 U.S.C.A.App. Sec. 453 (Supp. 1988).

The Supreme Court has also acknowledged as a corollary of the social contract theory, the maxim that "the Government's obligation of protection is correlative with the duty of loyal support inherent in the citizen's allegiance." Johnson, 339 U.S. at 770, 70 S.Ct. at 939. On the basis of this duty of loyalty, the Court has differentiated between

the rights of citizens and nonresident aliens complaining of unconstitutional actions by United States agents abroad. Id. Accordingly, some measure of allegiance to the United States, as evidenced by citizenship or residency, is the quid pro quo for receiving the privilege of invoking our Bill of Rights as a check on the extraterritorial actions of United States officials.

My reading of these cases convinces me that the scope of an alien's rights depends intimately on the extent to which he has chosen to shoulder the burdens that citizens must bear. Not until an alien has assumed the complete range of obligations that we impose on the citizenry may he be considered one of "the people of the United States" entitled to the full panoply of rights guaranteed by our Constitution.

I conclude, therefore, that Verdugo, as a nonresident Mexican citizen, does not enjoy the full panoply of rights guaranteed to "the people of the United States" by our Constitution. His obligation to refrain from violating our drug laws in his dealings with our citizens does not place upon him a burden sufficient to entitle him to the entire spectrum of constitutional rights available to citizens or resident aliens. He has neither undertaken to support our government, nor has he placed himself in a position where he might be called to serve in the national defense. More important, however, as a nonresident alien, he has assumed no duty or allegiance to the United States.

This is not to say that Verdugo receives no rights whatsoever in exchange for his obligation to stand trial in the

United States for alleged violations of our narcotics laws. I do not question that he is entitled to a fair judicial trial. Even as a nonresident alien, Verdugo is cloaked with fifth and sixth amendment rights during the actual charging and trial process in a criminal prosecution. Nearly a century ago, when Congress sought to criminalize violations of our immigration laws by subjecting aliens unlawfully present in this country "to infamous punishment at hard labor, or by confiscating their property," the Supreme Court held that "such legislation, to be valid [under the Constitution], must provide for a judicial trial to establish the guilt of the accused." Wong Wing, 163 U.S. at 237, 16 S.Ct. at 981; Turner, 194 U.S. at 291, 24 S.Ct. at 792. While the Court's decision was motivated in part by separa-

tion-of-powers or bill-of-attainder concerns, see 163 U.S. at 237, 16 S.Ct. at 981, 194 U.S. at 291, 24 S.Ct. at 792, it was also based upon the Court's interpretation of the fifth and sixth amendments as applying on their face to "all persons within the territory of the United States." Wong Wing, 163 U.S. at 238, 16 S.Ct. at 981. Hence, the Court ruled that "even aliens shall not be held to answer for a capital or other infamous crime, unless on a presentment or indictment of a grand jury, nor be deprived of life, liberty, or property without due process of law." Id. I believe that by providing Verdugo with fifth and sixth amendment protections during the charging and trial phases of the criminal process, our government has given him ample consideration to justify subjecting him to our drug laws.

II

Verdugo, however, was detained in the United States on criminal charges at the time that his Mexicali residence was searched. This circumstance suggests two additional inquires. First, one must ask whether Verdugo's physical presence in this country at the time the search occurred conferred upon him a "residence" status sufficient to trigger extraterritorial fourth amendment rights. Next, one must determine whether the fact that he was under criminal prosecution when the search took place carries any special significance for our fourth amendment jurisprudence.

A.

Being held in custody in the United States pending the disposition of criminal charges does not, in itself,

establish the residency required to trigger fourth amendment protections. Long ago, the Supreme Court intimated that an alien "who has been here for too brief a period to have become, in any real sense, a part of our population," might not be eligible to invoke the due process clause of the fifth amendment. See The Japanese Immigrant Case, 189 U.S. at 100, 23 S.Ct. at 614; cf. Leng May Ma v. Barber, 357 U.S. 185, 187-88, 78 S.Ct. 1072, 1073-74, 2 L.Ed.2d 1246 (1958) (alien detained in custody pending determination of his admissibility is no "within the United States" although alien is physically present in United States). By emphasizing that its holding applied only to aliens who had resided in this country long enough to be considered "part of the population," 189 U.S. at 100-01, 23 S.Ct. at 614, the

Court in The Japanese Immigrant Case acknowledged that the mere fact that one is physically present in the United States did not elevate one to the status of a resident alien endowed with the full panoply of constitutional protections. While the Court has subsequently recognized that the fifth amendment's guarantee of due process of law applies even to aliens "whose presence in this country is unlawful, involuntary, or transitory," Mathews v. Diaz, 426 U.S. 67, 77, 96 S.Ct. 1883, 1890, 48 L.Ed.2d 478 (1976) (Mathews), the Court also immediately thereafter cautioned that "[t]he fact that all persons, aliens and citizens alike, are protected by the Due Process Clause does not lead to the further conclusion that all aliens are entitled to enjoy all the advantages of citizenship, or indeed, to the conclu-

sion that all aliens must be placed in a single homogeneous legal classification." Id. at 78, 96 S.Ct. at 1890.

Mathew's admonition is unremarkable. As we observed earlier, differentiating among different noncitizens based upon different circumstances has always been a part of our jurisprudence. That the protections of our Bill of Rights are not an all-or-nothing proposition where aliens are concerned was previously recognized by the Court in Turner. In that case, the Court saw no inconsistency in reaffirming its prior holding in Wong Wing, 163 U.S. at 238, 16 S.Ct. at 981, that the fifth and sixth amendments apply to criminal proceedings brought against illegal aliens, while at the same time, opining that such aliens had no first amendment rights. Turner, 194 U.S. at 291-92, 24 S.Ct. at 722-23.

Subsequently, in Balzac, 258 U.S. at 312, 42 S.Ct. at 348, the Court recognized that while the Constitution is "in force" wherever our sovereign power is exerted, as in our territories, "[t]he Constitution . . . contains grants of power and limitations which in the nature of things are not always and everywhere applicable." Clarifying its prior decisions regarding the scope of constitutional protections in our insular possessions, the Court observed that "the real issue [in those cases] was not whether the Constitution extended to [our territories] when we went there, but which of its provisions were applicable by way of limitation upon the exercise of executive and legislative power in dealing with new conditions and requirements." Id. According to Balzac, even where the United States is

sovereign, the protections of the Constitution do not always extend indiscriminately to territories outside of the fifty states. Where the United States is not sovereign, as in Mexico, our constitutional protections may apply even more selectively. Hence, while Verdugo's brief, involuntary presence in this country may confer upon him fifth and sixth amendment rights during the criminal proceedings against him, it does not follow from this that, as a nonresident alien complaining of United States search that occurred on soil over which it is not sovereign, he is also invested with the protections of the fourth amendment.

Subsequent to its decisions in Turner and Balzac, the Supreme Court has recognized that aliens within our borders have "been accorded a generous and

ascending scale of rights as [they increase] [their] identity with our society." Johnson, 339 U.S. at 770, 70 S.Ct. at 939; accord Kwong Hai Chew, 344 U.S. at 596-97 n. 5, 73 S.Ct. at 477 n.5." "Mere lawful presence in the country creates an implied assurance of safe conduct and gives [the alien] certain rights; they become more extensive and secure when he makes a preliminary declaration of intention to become a citizen, and they expand to those of full citizenship upon naturalization." Johnson, 339 U.S. at 770, 70 S.Ct. at 940; accord Kwong Hai Chew, 344 U.S. at 596-97 n. 5, 73 S.Ct. at 477 n. 5. More recently, in Plasencia, 459 U.S. at 32, 103 S.Ct. at 329, the Court recognized that while "an alien seeking initial admission to the United States requests a privilege and has no constitutional rights . . .

once an alien gains admission to our country and begins to develop the ties that go with permanent residence his constitutional status changes accordingly." Thus, the degree of constitutional protection applicable to an alien is heavily depending on the ties that he develops with this country through his residency status. Undoubtedly, the lack of constitutional protection for aliens residing outside our borders reflects their want of ties. Absent an intention to form bonds with the United States, no constitutional compact can be fairly implied.

We have been taught by the Supreme Court that non-resident aliens are not bestowed with the entire package of rights secured by the Bill of Rights. Knowing this, however, does not, in itself, tell us whether a nonresident

alien is cloaked with extraterritorial fourth amendment rights simply by virtue of the fact that he was in custody in the United States when the search took place. While our precedent is indeterminate on this point, my reading of the language and history of the Constitution convinces me that while nonresident aliens may invoke the fifth and sixth amendments at trial, they may not fall back upon the fourth amendment to complain about a foreign search conducted by United States agents. As I have already observed, the fourth amendment extends its guarantees to "the people," meaning "the people of the United States." Elsewhere in the Bill of Rights, the Framers sought to constrain the reach of the federal government in the name of "the people." Besides the fourth amendment, the name of "the peo-

ple" is specifically invoked in the first, second, ninth, and tenth amendments. Presumably, "the people" identified in each amendment is coextensive with "the people" cited in the other amendments. No contrary indication appears in either the text or history of the Constitution.

Reading the foregoing amendments together in a self-consistent fashion, I cannot hold that "the people" includes within its ambit nonresident aliens who, for whatever reason, happen to find themselves temporarily in this country. In Turner, 194 U.S. at 292, 24 S.Ct. at 723, an excludable alien who had illegally entered the United States sought to invalidate a statute permitting Congress to exclude anarchists on the grounds that it violated his first amendment rights. The Supreme Court responded

that such an alien did not become one of "the people" entitled to invoke the first amendment's protections merely by illegally entering this country. Id. Reading "the people" in the first and fourth amendments consistently would lead one to the same result for the fourth amendment. A fortiori, where the alleged unconstitutional actions occur in a foreign territory, a person in Verdugo's circumstance is in no position to appear to the fourth amendment as one of "the people" of the United States.

The definitions of those entitled to fifth and sixth amendment protections are broader. Those rights are not restricted to "the people" but the fifth amendment protects every "person" while the sixth amendment protects every "accused." Despite this clear difference in

the language of the fifth and sixth amendments, as compared with that of the fourth amendment, the majority continues to insist that "[i]t would be odd indeed to acknowledge that Verdugo-Urquidez is entitled to due process under the fifth amendment, and to a fair trial under the sixth amendment, both of which rights he is accorded under established constitutional jurisprudence, and deny him the protection from unreasonable searches and seizures afforded under the fourth amendment." Maj. op. at 1224. Relying on the dictum of the plurality and the four dissenting opinions in INS v. Lopez-Mendoza, 468 U.S. 1032, 104. S.Ct. 3479, 82 L.Ed.2d 778 (1984) (Lopez-Mendoza), implying that illegal aliens have fourth amendment rights against unreasonable searches and seizures by INS officers, the majority further urges

that it would be inconsistent to deny Verdugo fourth amendment rights in this case. According to the majority, "it seems absurd to grant the protection of the fourth amendment to one whose presence in the country is voluntary although illegal, and yet deny it to Verdugo-Urquidez, whose presence in the United States, although legal, is plainly involuntary." Maj. op. at 1224.

These statements by the majority indicate that it has overlooked what I believe to the crucial distinction between the cases cited by the majority and the instant case. When government officials violate a person's fifth and sixth amendment rights <u>at trial</u>, the constitutional infringement occurs <u>within the United States</u>. By contrast, when government officials violate a person's expectations of privacy in foreign territory, the complained of actions occur <u>on foreign soil</u>. In other words, the operative distinction between this case and the cases relied upon by the majority is <u>the locus of governmental action</u>. The fatal flaw in the majority's reliance on cases that have since extended various constitutional rights to aliens, whether they are legal or illegal, resident or mere visitor, is that none of these cases involves extraterritorial actions taken by our officials against aliens. Each one of these cases cited by the majority impose restraints on actions taken with United States territory by the government. The challenged actions of the DEA agents in Verdugo's case, by contrast, occurred in Mexico under the sovereignty of the Mexican government. Hence, whether an alien is legally or illegally in this

country, whether he is a permanent resident or temporary sojourner, or, for that matter, whether he was within or without United States jurisdiction at the time the acts occurred is not the decisive question in this case. Rather, the dispositive question with respect to Verdugo is where the unconstitutional actions of our government's agents took place. Simply put, not a single case cited by the majority extends constitutional protections to a non-resident alien with respect to actions taken by our officials on foreign soil. Thus, the majority's analysis is completely wide of the mark.

By focusing on the locus of government action, any apparent inconsistency between a holding that Verdugo is not entitled to extraterritorial fourth amendment rights and the Supreme Court's

dicta in Lopez-Mendoza quickly vanishes. Equally important, focusing on where the government action occurred is the only way that the Supreme Court's various pronouncements on the constitutional rights of aliens can be reconciled. In the absence of a clear indication by the Court itself that it is overruling an earlier precedent, I believe that, as a circuit court, we are obligated to reconcile any apparent divergence in the Court's precedents as best we can. As I see it, we are faced with three guiding principles. First, the cases cited by the majority establish that all aliens are entitled to constitutional protections while they are in this country. See, e.g., Yick Wo, 118 U.S. at 369, 6 S.Ct. at 1070, Wong Wing, 163 U.S. at 238, 16 S.Ct. at 981; Turner, 194 U.S. at 291, 24 S.Ct. at 722; Mathews,

426 U.S. at 77, 96 S.Ct. at 1890; Plyler, 457 U.S. at 211, 102 S.Ct. at 2391. Second, the Constitution apparently follows American citizens when they go abroad. See Reid, 354 U.S. at 6, 77 S.Ct. at 1225. Third, the extraterritorial force of the Constitution does not apply to persons other than our citizens or, perhaps, aliens with significant ties to the United States. See Curtiss-Wright, 299 U.S. at 318, 57 S.Ct. at 220; Johnson, 329 U.S. at 770, 70 S.Ct. at 939. The only way that all three principles can be reconciled is if aliens are accorded constitutional protections as against governmental action occurring in United States territory but not as against governmental action occurring on foreign soil. But, as I have previously observed, the majority does not attempt to solve its dilemma because

it neglects to mention, much less distinguish, the Supreme Court's express restriction of the Constitution's extraterritorial life to American citizens in Curtiss-Wright and Johnson. Having completely ignored these cases, it comes as no surprise that the majority fails to recognize that the locus of the alleged unconstitutional action should determine whether an alien is entitled to constitutional protections.

Thus, as a matter of constitutional interpretation, no inconsistency results from holding that nonresident aliens are entitled to the same fifth and sixth amendment rights in a criminal proceeding as are citizens, while at the same time concluding that such aliens are not entitled to the extraterritorial protections that might conceivably apply to American citizens abroad. The American

flag simply does not follow nonresident aliens beyond our territorial limits. As pointed out before, the Supreme Court has recognized that nonresident aliens do not stand on the same footing as American citizens when complaining of alleged unconstitutional actions of our agents in foreign countries. See Johnson, 339 U.S. at 770, 70 S.Ct. at 939.

B.

I next inquire whether my conclusion that a nonresident alien may not invoke the protections of the fourth amendment for foreign searches should be altered by the fact that Verdugo was under criminal prosecution at the time the search occurred. Having determined that the commands of the fourth amendment do not apply to extraterritorial searches of the residences of nonresi-

dent aliens who find themselves in custody in this country, I can find no basis for holding that the fourth amendment attaches merely because the subject of the search is under criminal prosecution in the United States. As I stated earlier, the fact that Verdugo, a foreign national, may be called to account for violations of our drug laws is insufficient to cloak him with the entire mantle or rights enjoyed by American citizen [sic] abroad. Hence, unlike a citizen or, perhaps, a permanent resident alien, Verdugo is not entitled under Supreme Court precedent to invoke the Constitution as a check on the actions of our government's DEA agents in Mexico.

I am aware of cases intimating that certain constitutional guarantees apply to anyone brought within the United States to be tried for a criminal of-

fense. But as I indicated in part I.C., those cases are readily distinguishable because they relate to rights of the accused arising under the fifth and sixth amendments, which ensure fairness during the trial process itself. In In re Ross, for example, the Court suggested that anyone brought within the United States to be criminally prosecuted can invoke the sixth amendment's guarantees of a grand jury indictment and trial by jury. 140 U.S. 464, 11 S.Ct. at 900. Ross's holding, however, follows from the identical promise as the Court's decision in Wong Wing, namely, that the fifth and sixth amendments apply in a criminal proceeding to anyone, citizen and alien alike, within the territorial limits of the United States. 163 U.S. at 238, 16 S.Ct. at 981. In part II.A., I explained that under Supreme Court prece-

dent, a nonresident alien can claim the protections of the Constitution only against governmental action perpetrated within territory under United States sovereignty. Fifth and sixth amendment violations during a trial conducted in the United States obviously involve acts occurring within United States territory. Unlike the right to a jury trial or to due process of law, however, fourth amendment violations do not occur at trial. Violations of the fourth amendment occur at the time the government intrudes unreasonably into a citizen's legitimate sphere of privacy. Leon, 468 U.S. 897 at 906, 104 S.Ct. 3405 at 3411, 82 L.Ed.2d 677 (1984); United States v. Calandra, 414 U.S. 338, 354, 94 S.Ct. 613, 623, 38 L.Ed.2d 561 (1974) (Calandra). No independent violation of the fourth amendment occurs when

illegally seized evidence is introduced into a criminal proceeding. Leon, 468 U.S. at 906, 104. S.Ct. at 3411; United States v. Janis, 428 U.S. 433, 458-59 n. 35, 96 S.Ct. 3021, 3034, n. 35, 49 L.Ed.2d 1046 (1976) (Janis). Because Verdugo is not entitled to challenge the extraterritorial search of his residence, there is no fourth amendment bar to admitting the drug tally sheets in the criminal proceedings against him.

Nor does our prior decision in United States v. Peterson, 812 F.2d 486 (9th Cir. 1987), in which we had occasion to discuss the extraterritorial application of the fourth amendment, call for a different result. Unlike Verdugo, the appellants in Peterson were apparently American citizens. In that case, moreover, we did not hold that the fourth amendment applied to

extraterritorial searches; we assumed for purposes of the appeal that the fourth amendment applied, but concluded that even if it applied to the foreign search in question, the federal officers' alleged misconduct overseas was excused under Leon's good faith exception to the exclusionary rule. Id. at 489, 491-92. Further, Peterson involved a search upon the high seas, an area of law governed by its own separate doctrine. Id. at 489. Peterson is thus inapplicable to the facts of this case.

With the exception of United States v. Toscanino, 500 F.2d 267 (2d Cir. 1974) (Toscanino), which I will address in part III, the cases relied upon by the district court in support of its determination that the fourth amendment applies to the search of Verdugo's home in Mexico are either distinguishable or

inapposite. Cardenas v. Smith, 733 F.2d 909, 915-17 (D.C.Cir. 1984), suggested that a Colombian national might have standing to challenge violations of the fourth and fifth amendments resulting from a seizure of her Swiss bank account. By its own terms, however, the suggestion was mere dictum. Id. at 917. The Court remanded the case for a finding of whether she was "in that group of aliens who are the intended beneficiaries of the relevant constitutional guarantees," and expressly refused to given any opinion on whether she would be able to establish standing. Id. Similarly, the statement in Jean v. Nelson, 727 F.2d 957, 973 (11th Cir. 1984), aff'd on other grounds, 472 U.S. 846, 105 S.Ct. 2992, 86 L.Ed.2d 664 (1985), that "aliens who are the victims of unconstitutional government action

abroad are protected by the Bill of Rights if the government seeks to exploit fruits of its unlawful conduct in a criminal proceeding in the United States," was dictum because the Eleventh Circuit had no occasion to apply it to that case.

The district court also invoked United States v. Cortes, 588 F.2d 106, 110 (5th Cir. 1979), and United States v. Demanett, 629 F.2d 862, 866 (3d Cir. 1980), cert. denied, 450 U.S. 910, 101 S.Ct. 1347, 67 L.Ed. 2d 333 (1981), for the proposition that aliens may mount fourth amendment challenges to searches beyond the United States' territorial jurisdiction. Those cases, however, involved the boarding of vessels on the high seas, and are therefore distinguishable from the facts of this case. Searches on the high seas raise unique

questions of sovereignty. "The high seas are generally not subject to the sovereignty of any state." Carmichael, At Sea With the Fourth Amendment, 32 U. Miami L.Rev. 52, 58 & n. 28 (1977) (Carmichael). "[U]nlike land borders, the region beyond the territorial boundaries at sea is not subject to the exclusive jurisdiction of any other sovereign and can be patrolled by United States vessels." Note, High on the Seas" Drug Smuggling, The Fourth Amendment, and Warrantless Searches at Sea, 93 Harv.L.Rev. 725, 733 & n. 46 (1980) (Note).

Each nation is accorded a limited right of sovereignty under maritime law over any vessel whose passage may affect certain national interests. Hence a complex web of statutes, treaties, conventions, and universally accepted prin-

ciples of international law authorizes the Coast Guard to board both foreign and domestic vessels on the high seas and within our territorial waters if such vessels are suspected of violating our laws. See generally Church v. Hubbart, 6 U.S. (2 Cranch) 187, 234-35, 2 L.Ed. 249 (1804); United States v. Williams, 617 F.2d 1063, 1079-84 (5th Cir. 1980); Carmichael at 51-75 & accompanying notes; Note at 725-27 & accompanying notes. A vessel thus boarded becomes the subject to our complete jurisdiction and sovereign power. Because "[t]he Constitution of the United States is in force. . .wherever and whenever the sovereign power of [our] government is exerted," Balzac, 258 U.S. at 312-13, 42 S.Ct. at 348 (emphasis added), it is not surprising that searches on the high seas may be subject

to the fourth amendment, even when they are manned by foreign nationals.

In contrast, the residence of a foreign national on foreign soil is subject to the jurisdiction and control of the foreign sovereign. Consequently, such a foreign residence is not protected by the Constitution, for "[n]either the Constitution nor our laws . . . have any force in foreign territory unless in respect of our own citizens." Curtiss-Wright, 299 U.S. at 318, 57 S.Ct. at 220. Verdugo's residences in Mexico were at all times under Mexican sovereignty. The DEA agents were in Mexico only as guests of the Mexican sovereign and were able to search Verdugo's residences only at the Mexican sovereign's pleasure. Hence, the cases involving searches on the high seas are inapplicable to the

searches of Verdugo's residences in Mexico.

Nor does our prior decision in In re Aircrash in Bali, Indonesia on April 22, 1974, 685 F.2d 1301 (9th Cir. 1982) (Bali), govern this appeal. We granted Australian plaintiffs in that case standing to challenge the constitutionality of the Warsaw Convention's limitation on liability in air carrier accidents. We recognized that under Wong Wing, 163 U.S. at 238, 16 S.Ct. at 981, "persons" within the meaning of the fifth amendment included all "persons who have a valid claim over which our federal courts have jurisdiction." Bali, 684 F.2d 1308 n. 6. To the extent that Congress gave these nonresident aliens the right to sue in our courts for torts committed by Americans, the aliens should have standing to object to

statutes that deprive them of their damages. Further, the alleged constitutional violations, the application of the Warsaw Convention's liability limits to their claims, occurred in the United States, not abroad. Finally, while acknowledging that "there are undoubtedly constitutional provisions the protection of which nonresident aliens may not claim," we held that where a treaty such as the Warsaw Convention applies generally on its face to both residents and nonresidents of the United States, the fifth amendment would not permit "the application of different rules of decision to residents and nonresidents suing on the same cause of action in the same court." Id. (citation omitted). Bali, then, has no bearing on the question whether a nonresident alien under criminal prosecution in the United States may

invoke the fourth amendment's exclusionary rule to seek suppression of evidence seized from his residence abroad.

III

Having concluded that the fourth amendment does not apply to the search of Verdugo's residence, I next inquire whether the exclusion of the evidence seized in this case can be justified on some other ground. Application of the exclusionary rule, after all, presupposes a fourth amendment violation. United States v. Benevento, 836 F.2d 60, 69 (2d Cir. 1987) (because the fourth amendment does not apply to routine border searches, neither does the exclusionary rule); United States v. Dominguez, 604 F.2d 304, 312 (4th Cir. 1979), cert. denied, 444 U.S. 1014, 100 S.Ct. 664, 62 L.Ed.2d 644 (1980). The district

court's decision suggests two possible alternative bases for suppressing the evidence in this case. The first basis is suggested in Toscanino, 500 F.2d at 286, which held that "aliens who are the victims of unconstitutional action abroad" may invoke the protections of the Bill of Rights to prevent the government from "exploit[ing] the fruits of its unlawful conduct in a criminal proceeding against the alien in the United States." Second, the district court's opinion suggests that courts possess inherent power to require that foreign searches conform to the requirements of the fourth amendment. I will address these two theories in turn.

A.

In Toscanino, the Second Circuit suggested that a non-resident foreign national could invoke the fourth amend-

ment to protest the seizure of evidence by United States agents abroad. 500 F.2d at 280-81. The district court, relying on Toscanino, stated "[i]t seems unlikely that the Fourth Amendment was not intended to protect an alien, already in the custody of the United States and charged in a criminal complaint, from searches of his foreign residences conducted by United States agents for the express purpose of obtaining evidence relevant to the pending prosecution." To the extent that Toscanino rests on the proposition that aliens in Verdugo's position may seek suppression of evidence seized abroad under the fourth amendment, I reject its conclusion. The majority in Toscanino cited no authority, nor did it provide any sound reasoning, for its expansive holding. The majority merely concluded,

without explanation, that because United States citizens were protected by the fourth amendment abroad, and because aliens in the United States are protected by the fourth amendment within our borders, that "no sound reason" justified a different rule for nonresident aliens. Id. This is the same logical fallacy to which the majority in the instant case falls prey. As I stated earlier, I believe that sound reasons exist to distinguish between a foreign search of property belonging to an American citizen.

However, as Judge Anderson pointed out in his concurrence, the majority in Toscanino could have reached its result on due process grounds, without deciding the question whether the Bill of Rights has extraterritorial application to foreign nationals. Id. at 281.

Toscanino presented a unique fact situation. Toscanino, an Italian citizen, alleged that he was kidnapped from his home in Uruguay, tortured, and illegally brought within the territorial jurisdiction of the United States and that, prior to his abduction, American officials had unlawfully gathered evidence against him through electronic surveillance of his telephone. Id. at 268. He not only challenged the introduction of the evidence seized in Uruguay, but also the power of the district court to assert jurisdiction over his person. Confronting the Second Circuit was a long line of authority first announced in Ker v. Illinois, 119 U.S. 436, 7 S.Ct. 225, 30 L.Ed. 421 (1886), and unequivocally reaffirmed in Frisbie v. Collins, 342 U.S. 519, 72 S.Ct. 509, 96 L.Ed. 541 (1952), holding that the dis-

trict court's power to try a person for a crime was not vitiated by the fact that he was brought within its jurisdiction by "forcible abduction." 500 F.2d 271-72. The Second Circuit, however, argued that since Frisbie, the Supreme Court had expanded the fifth amendment's guarantee of due process "to bar the government from realizing directly the fruits of its own deliberate and unnecessary lawlessness in bringing the accused to trial." Id. at 272. Citing Rochin v. California, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183 (1952) (Rochin), the Second Circuit recognized that "the Supreme Court broadened its interpretation of due process to set aside for the first time a state court conviction resting on evidence obtained through police brutality." Toscanino, 500 F.2d at 273.

Indeed, the Court in Rochin held that the due process clause required it to determine from "the whole course of the proceedings. . . whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses." 342 U.S. at 169, 72 S.Ct. at 208. The Court was careful, however, to clarify that the conduct involved in that case offended more than "some fastidious squeamishness or private sentimentalism about combatting crime too categorically." Id. at 172, 72 S.Ct. at 209. Rather, it was conduct that "shocks the conscience." Id. Subsequently, relying on Rochin, the Court in United States v. Russell, 411 U.S. 423, 93 S.Ct. 1637, 36 L.Ed.2d 366 (1973), suggested in dictum that while certain law

enforcement practices may not violate the Constitution or federal law, they may be "so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction." Id. at 431-32, 93 S.Ct. at 1643.

But the reasoning that underlies Rochin and its progeny stems not from the fourth but the fifth amendment. Analyzed under the fifth amendment, Toscanino could be harmonized with other precedent. See 500 F.2d at 281 (Anderson, J., concurring in the result). Toscanino alleged circumstances surrounding the seizure of his person and delivery into the court's jurisdiction which would offend the sensibilities of any civilized person. He was allegedly taken blindfolded and at gunpoint to Brazil and held captive for

three weeks of interrogation while being subjected to inhumane forms of physical torture by United States officials. Id. at 269-70. According to Toscanino,

> his captors denied him sleep and all forms of nourishment for days at a time. Nourishment was provided intravenously in a manner precisely equal to an amount necessary to keep him alive. Reminiscent of the horror stories told by our military men who returned from Korea and China, Toscanino was forced to walk up and down a hallway for seven or eight hours at a time. When he could no longer stand he was kicked and beaten but all in a manner contrived to punish without scarring. When he would not answer, his fingers were pinched with metal pliers. Alcohol was flushed into his eyes and nose and other fluids . . . were forced up his anal passage. Incredibly, these agents of the United States government attached electrodes to Toscanino's earlobes, toes, and genitals. Jarring jolts of electricity were shot throughout his body, rendering him unconscious for indeterminate periods of times but again leaving no physical scars.
>
> Id. at 270.

Despite the truly revolting circumstances that were alleged in Toscanino,

its due process holding is of doubtful validity. To the extent that Toscanino was based on the Second Circuit's belief that the Ker-Frisbie doctrine may no longer be good law, its rationale has been substantially undermined by subsequent Supreme Court decisions that have wholeheartedly and repeatedly reaffirmed the Ker-Frisbie rule. See, e.g., Lopez-Mendoza, 468 U.S. at 1039-40, 104 S.Ct. at 3483-84; United States v. Crews, 445 U.S. 463, 474, 100 S.Ct. 1244, 1251, 63 L.Ed.2d 537 (1980); id. at 477-79, 100 S.Ct. at 1253-54 (Powell, J. concurring in part) (White, J. concurring in result) (majority of court reaffirming Frisbie); Stone v. Powell, 428 U.S. 465, 485, 96 S.Ct. 3037, 3048, 40 L.Ed.2d 1067 (1976) (Stone); Gerstein v. Pugh, 420 U.S. 103, 119, 95 S.Ct. 854, 865, 43 L.Ed.2d 54

(1975). Indeed, the majority acknowledges that in a case following Toscanino, the Second Circuit clarified that its due process holding in Toscanino was largely impelled by the outrageous acts of kidnap and torture conducted by United States agents. See United States ex rel. Lujan v. Gengler, 510 F.2d 62, 65-66 (2d Cir.) (Gengler), cert. denied, 421 U.S. 1001, 95 S.Ct. 2400, 44 L.Ed.2d 668 (1975). Although it was not confronted with a fourth amendment issue in that case, the Second Circuit in Gengler held that absent "the use of torture, brutality and similar outrageous conduct" condemned in Toscanino, the district court was not required to divest itself of jurisdiction over a person who was forcibly abducted in Bolivia and brought into the United States. Id. at 68.

By maintaining that the fourth amendment, and hence its exclusionary rule, does not apply to searches of foreign nationals on foreign soil by United States agents, I do not suggest that a federal court can never exclude from a criminal proceeding evidence obtained abroad against an alien by United States officers. To the extent that Toscanino recognized that aliens may invoke the fifth amendment to challenge the admission of evidence that was obtained through means that "shock the conscience," I find the case unobjectionable. This rule is consistent with those cases suggesting that the fifth amendment applies to anyone, citizen and alien alike, subject to criminal prosecution in the United States. Wong Wing, 163 U.S. at 238, 16 S.Ct. at 981. We have previously speculated that such a

"shock-the-conscience" test might apply to an extraterritorial search of an American citizen in a proper case. See Stonehill v. United States, 405 F.2d 738, 745 (9th Cir. 1968)(Stonehill), cert. denied, 395 U.S. 960, 89 S.Ct. 2102, 23 L.Ed.2d 747 (1969).

Whether this court should embrace such a due process "shock-the-conscience" test, however, is not a question that needs to be reached in this case. For even if this court were to adopt that test, the conduct of the DEA agents in searching Verdugo's residence is simply not comparable to the official acts of torture, brutality, or other outrageous invasions of a defendant's bodily security that were present in those cases where police conduct was found to "shock the conscience." See, e.g., Rochin, 342 U.S. 165, 166, 72

S.Ct. 205, 206 (evidence seized by forcing emetic solution into his stomach to induce vomiting); Irvine v. California, 347 U.S. 128, 133, 74 S.Ct. 381, 383, 98 L.Ed. 561 (1954) (suggesting that "shock-the-conscience" test applies only to cases of violence and brutality comparable to Rochin); United States v. Mount, 757 F.2d 1315, 1323 & n. 6 (D.C. Cir. 1985))(Bork, J., concurring) (declining to exclude, on grounds that it "shocks the conscience," evidence seized abroad in an allegedly improper search); Stonehill, 405 F.2d at 745 (refusing to apply due process "shocks-the-conscience" test to raid of defendant's business premises by Philippine authorities). Indeed, Verdugo does not appeal the district court's ruling that its jurisdiction over him is not barred by the manner in which the government

obtained his custody. Exclusion of the drug tally sheets seized in this case is therefore not warranted by any possible due process concerns.

Because Verdugo does not challenge the district court's adverse ruling on its jurisdiction over him, the majority's discussion of the circumstances of his arrest by Mexican police and transport across the border into United States custody is both irrelevant and gratuitous. Such circumstances are not pertinent to the fourth amendment issue and, therefore, should have played no role in the majority's decision.

B.

Finally, I will discuss whether the district court possessed inherent supervisory power to suppress the evidence seized by the DEA in this case. The district court concluded that it pos-

sessed the inherent power to require that extraterritorial searches conform to the warrant and reasonableness requirements of the fourth amendment for the purpose of ensuring proper police action abroad.

However laudable a policy this may be, a federal judge is without power to exclude evidence merely because he or she disapproves of the particular conduct of governmental agents. In the absence of a constitutional violation, there is simply no authority to justify excluding the evidence in this case. I reject the suggestion that under vaguely-defined "inherent power" or "supervisory power," courts can devise exclusionary rules either to deter misconduct that falls short of violating the Constitution or to preserve "judicial integrity." Although it is clear that the

prime purpose of the exclusionary rule is to deter police misconduct, Janis, 428 U.S. at 446, 96 S.Ct. at 3028, it is not designed to deter all misconduct. Rather, it is aimed at deterring only misconduct that violates the fourth amendment. See, id. (the exclusionary rule "is a judicially created remedy designed to safeguard Fourth Amendment rights . . ."); Calandra, 414 U.S. 348, 94 S.Ct. at 620 (same); see also United States v. Payner, 447 U.S. 727, 733, 100 S.Ct. 2439, 2445, 65 L.Ed.2d 468 (1980) (Payner) (rejecting proposition "that a federal court should use its supervisory power to suppress evidence tainted by gross illegalities that did not infringe the defendant's constitutional rights").

In United States v. Gatto, 763 F.2d 1040 (9th Cir. 1985) (Gatto), we recog-

nized that "a court may not exercise any supervisory power absent 'a clear basis in fact and law for doing so.'" Id. at 1046, quoting United States v. Chanen, 549 F.2d 1306, 1313 (9th Cir.), cert. denied, 434 U.S. 825, 98 S.Ct. 72, 54 L.Ed.2d 83 (1977). That we might disapprove of the manner in which government agents conduct their searches does not, in itself, beckon our intervention. See Gatto, 763 F.2d at 1046. While I recognize that there are statements in a number of opinions suggesting that the exclusionary rule exists not only to vindicate a defendant's constitutional rights, but also to protect the integrity of the court, see, e.g., Payner, 447 U.S. at 735-36 n. 8, 100 S.Ct. at 2446-47 n. 8; Mapp v. Ohio, 367 U.S. 643, 660, 81 S.Ct. 1684, 1694, 6 L.Ed.2d 1081 (1961); Elkins v. United States,

364 U.S. 206, 222-23, 80 S.Ct. 1437, 1446-47, 4 L.Ed.2d 1669 (1960)(Elkins), our cases have cautioned that "[j]udicial integrity is rarely threatened significantly when executive action does not violate the Constitution, a federal statute, or a procedural rule." Gatto, 763 F.2d at 1046. Indeed, the Supreme Court has clarified that "[t]he primary meaning of 'judicial integrity' in the context of evidentiary rules is that the courts must not commit or encourage violations of the Constitution." Janis, 428 U.S. at 458-59 n. 35, 96 S.Ct. at 3034 n. 35; see also Elkins, 364 U.S. at 223, 80 S.Ct. at 1447 (federal courts should not be accomplices in willful violations of the Constitution). Hence, "[w]hile courts, of course, must ever be concerned with preserving the integrity of

the judicial process, this concern has limited force as a justification for the exclusion of highly probative evidence." Stone, 428 U.S. at 485, 96 S.Ct. at 3048.

Our concern with "overzealous law enforcement" does not, absent a finding of a constitutional or statutory violation by government officers, give courts a "'chancellor's foot' veto over law enforcement practices" of which we happen to disapprove. Gatto, 763 F.2d at 1046. Contrary to allowing us to impose our conceptions of ideal conduct on our law enforcement officials, the Supreme Court has commanded us to weigh the exclusion of evidence "against" the considerable harm that would flow from indiscriminate application of an exclusionary rule." Payner, 447 U.S. at

734, 100 S.Ct. at 2445. Application of the exclusionary rule excludes probative evidence, and "exacts a costly toll upon the ability of courts to ascertain the truth in a criminal case." Id. Hence, the Court has "consistently recognized that unbending application of the exclusionary sanction to enforce ideals of government rectitude would impede unacceptably the truth-finding functions of judge and jury." Id.; accord Leon, 468 U.S. at 907, 104 S.Ct. at 3412; see also Calandra, 414 U.S. at 348, 94 S.Ct. at 620.

Congress, I believe, has endorsed this view that the lower federal courts are not at liberty to devise exclusionary rules in order to enforce abstract standards of police conduct. In Fed.R.Evid. 402, Congress has declared that "[a]ll relevant evidence is admissi-

ble, except as otherwise provided by the Constitution of the United States, Act of Congress, by these rules [of evidence], or by other rules prescribed by the Supreme Court pursuant to statutory authority."

In view of these considerations, the Supreme Court has refused to allow lower courts to invoke their supervisory or inherent powers to fashion exclusionary rules where established fourth amendment doctrine would not require exclusion of the evidence. See Payner, 447 U.S. at 735-36 & n. 8, 100 S.Ct. at 2446 & n. 8. The Court has itself been unwilling to expand the scope of the exclusionary rule, even where the fourth amendment clearly applies and has been violated. See Stone, 428 U.S. at 485-86, 96 S.Ct. at 3048. Thus, in its more recent cases, the Court has embraced the prima-

cy of the deterrence rationale for the exclusionary rule, rejecting separate considerations of judicial integrity. Janis, 428 U.S. at 446, 96 S.Ct. at 3028 (Deterrence is "the 'prime purpose' of the exclusionary rule, if not the sole one."). "Judicial integrity clearly does not mean that the courts must never admit evidence obtained in violation of the fourth amendment." Id. at 458 n. 35, 96 S.Ct. at 3034 n. 35. Thus, the Court has established doctrines such as the "good-faith exception" to the exclusionary rule, see Leon, 468 U.S. at 908-13, 104 S.Ct. at 3412-15, and the concept that one has no standing to suppress evidence obtained in violation of another's fourth amendment rights. Alderman v. United States, 394 U.S. 165, 174, 89 S.Ct. 961, 966, 22 L.Ed. 2d 176 (1969). If

the Court has refused to apply the exclusionary rule in many cases in which the fourth amendment has been violated, a fortiori, neither we nor the district courts are at liberty to impose the rule where no constitutional violation has occurred.

In the case before us, the drug tally sheets seized by the DEA agents are clearly relevant and probative evidence. We can override the "general need for untrammeled disclosure of competent and relevant evidence" only if we can find sufficiently countervailing considerations. See Elkins, 364 U.S. at 216, 80 S.Ct. at 1443. In light of my conclusions that the fourth amendment does not apply in this case and that judges are not at liberty to impose an exclusionary rule to enforce their private notions of how our constables

should comport themselves, I can find no basis for the suppression in this case.

My conclusion that we are without authority in this case to fashion a new exclusionary rule is reinforced by separation-of-powers concerns that arise whenever courts seek to control the actions of the executive branch abroad. In Gatto, we recognized that:

> A federal court that imposes sanctions on executive conduct that is otherwise permitted by the Constitution, a federal statute or a rule will most likely be invading the executive sphere rather than protecting itself from invasion. Similarly, the separation-of-powers principle suggests that the creation of a rule by supervisory power can be justified only when a recognized federal right has been violated.

763 F.2d at 1046. In the present case, any attempt on our part to create a new exclusionary rule would be doubly offensive to principles of separation-of-powers, because we would be attempting to direct the actions of United States executive officials abroad with regard to the citizens of a foreign sovereign. The Executive Branch has plenary authority over foreign relations. See United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 542, 70 S.Ct. 309, 312, 94 L.Ed. 317 (1950). Few matters are more peculiarly within the jurisdiction of the executive branch of government than the relations between our agents in a foreign country with citizens of that country. The Supreme Court has repeatedly affirmed that "[f]or reasons long recognized as valid, the responsibility for regulating the relationship between

the United States and our alien visitors has been committed to the political branches of our government. Since decisions in these matters may implicate our relations with foreign powers, . . . such decisions are frequently of a character more appropriate to either the Legislature or the Executive than to the Judiciary." Mathews, 426 U.S. at 81, 96 S.Ct. at 1892.

If relations between the United States and its alien visitors is a matter for the political branches of government, then a fortiori the executive's decisions as to how United States agents abroad should treat the citizens of another sovereignty is a matter beyond the judicial competence. This is an area which by its very nature implicates the executive's diplomatic machinery. "[A]ny policy toward aliens is vitally

and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference." Harisiades v. Shaughnessy, 342 U.S. 580, 588-89, 72 S.Ct. 512, 519, 96 L.Ed. 586 (1952); accord Kleindienst v. Manel, 408 U.S. 753, 765-67, 92 S.Ct. 2576, 2582-84, 33 L.Ed.2d 683 (1972). No doubt foreign sovereigns, like our own government, are concerned about the treatment of their subjects by agents of another country. Violations of the interests of their citizens by United States agents could certainly affect our diplomatic ties. Safeguarding the interests of foreign citizens in their own

country is, however, a responsibility that must ultimately fall on their own government, not our courts.

Moreover, the ability of United States agents in a foreign country to take any action against a citizen of that country often depends, in large part, on the authorization and cooperation of the foreign government. Whether we can obtain such authorization and cooperation depends on our diplomatic relationship with that country. When United States agents act abroad, they act at the pleasure of the host government. As guests acting under another's auspices, they are hardly in a position to demand that a foreign government recognize the force of our Constitution in its own land with respect to its own people. United States agents must conduct themselves as the officials of the

host government see fit. To fashion an exclusionary rule in this case would unduly tie the hands of the executive branch in its dealings with foreign nations regarding actions taken with respect to those nation's citizens. See Toscanino, 50 F.2d at 281 (Anderson, J., concurring in result).

The separation-of-powers concerns that counsel against creating an exclusionary rule with respect to actions taken abroad by our officials against foreign nations applies with equal force to the majority's imposition of a warrant requirement in this case. Although the majority recognizes that "a warrant issued by an American magistrate would be a dead letter in Mexico," and that "it would be an affront to a foreign country's sovereignty if the DEA presented an American warrant." maj. op. at

1230, the majority nevertheless proceeds to require a warrant in this case. I find this result very troubling.

First, by imposing a warrant requirement for extraterritorial searches, the majority opinion conflicts with our implicit holding in Peterson, 812 .2d at 490-92, that a warrant is not required before our agents can conduct an extraterritorial search. In Peterson, after concluding that Philippine law enforcement officials were part of a "joint venture" with DEA agents to investigate an international drug-smuggling operation, id. at 490, we held that, even if a wiretap conducted in the Philippines by the joint venture were illegal under Philippine law, our DEA agents were entitled to rely in good faith on the assurances of Philippine officials that the wiretap complied with Philip-

pine law. Id. at 492. No mention is made in the opinion that the DEA obtained a United States warrant before conducting the wiretap; instead, the opinion suggests that the lawfulness of the search under the fourth amendment turned solely on the question of its "reasonableness." Id. at 491 ("local law of the Philippines governs whether the search was reasonable"). The majority in this case attempts to gloss over this essential fact by diverting our attention to a second warrantless search of a vessel on the high seas that was justified by exigent circumstances. Id. at 494. However, that search formed the basis for only one of the defendants' evidentiary objections in Peterson. The defendants' first contention was that "discovery of the ship and its contraband [was] tainted by unlawful

wiretaps participated in by United States officials." Id. at 489. If a warrant were required to conduct the foreign wiretap search in Peterson, then we would have suppressed the evidence obtained through the illegal wiretap and all of its fruits, including the marijuana subsequently seized in the search of the vessel, whose identity to the DEA was known only as a result of the wiretap. Id. at 488-89. Hence, the majority's requirement of a warrant to conduct a foreign search in this case squarely conflicts with Peterson's implicit holding that a warrant is not required in such cases.

By imposing a warrant requirement in foreign searches, the majority creates numerous other problems of both constitutional and pragmatic dimensions. In authorizing American magistrates to

issue still-born search warrants, the majority has written a prescription for advisory opinions, in violation of Article III. Moreover, insofar as the majority's decision allows the judiciary to control the actions of our agents in foreign territory--a matter that is quintessentially the province of the executive branch-- the extraterritorial warrant requirement breaches the separation-of-powers between the judicial and executive branches of our government. Finally, the majority's ruling ignores the practical realities that when our agents conduct searches abroad, they are at the mercy of foreign officials. The foreign officials are the ones who decide the scope and reasonableness of any proposed search, whether the search will occur at all, and under what conditions it will be conducted. Even if, in a

given case, these foreign officials defer considerably to the requests of our own agents, the fact remains that our agents are conducting the search at the pleasure and under the terms imposed by our foreign hosts.

Needless to say, I do not suggest that we should license United States agents engaged abroad in a criminal investigation to act indiscriminately against foreign nations. In cases in which our agents obtained evidence by means so outrageous and indecent as to "shock the conscience," such as through torture, due process might require exclusion of such evidence in a criminal proceeding brought against the foreign national in the United States. This is not such a case.

IV

My analysis of the text and history of the Constitution as well as Supreme Court precedent convinces me that a nonresident foreign national in custody in the United States pending criminal prosecution cannot invoke the fourth amendment's protections against a search of his foreign residence by United States officers. In the absence of a fourth amendment violation, I see no basis for holding that the district court possess (sic) the inherent power to exclude the evidence seized by United States officers. The majority's ill-advised and unprecedented warrant requirement is diametrically opposed to fourth amendment jurisprudence. Morever, I believe that, even if the fifth amendment required exclusion of evidence obtained by means that "shock the conscience," admission of the evidence

seized in this case would not violate Verdugo's due process rights at trial.

I would hold, therefore, that it was error for the district court to have suppressed the evidence of the drug tally sheets seized by the DEA agents in Mexico.

I respectfully dissent.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

Case No. 86-0107-JLI-Crim.

UNITED STATES OF AMERICA, PLAINTIFF

v.

RENE MARTIN VERDUGO-URQUIDEZ(1),

DEFENDANTS

MEMORANDUM DECISION AND ORDER

[Filed Feb. 5, 1987]

The Court heard evidence relevant to the motion to suppress filed by defendant Rene Martin Verdugo Urquidez on October 23, November 21, and November 26, 1986. At the evidentiary hearing, Michael Pancer, Patrick Hall and Eugene G. Iredale appeared on behalf of Verdugo. Assistant U.S. Attorney Warren P. Reese appeared on behalf of the government. Because it raises issues yet to be addressed by the Ninth Circuit which concern the application of the Fourth Amendment to foreign searches, the court submitted the motion in order to set forth in writing its ruling and underlying reasoning. The court has considered the papers filed in support of and in opposition to the motion, the testimony and exhibits offered during the evidentiary hearing, and the oral argument of

counsel, and now issues the following memorandum decision and order.

I. FINDINGS OF FACT

On the basis of a complaint charging Verdugo with various narcotics-related offenses, the government obtained, on August 3, 1985, a warrant for his arrest. On Friday, January 24, 1986, United States Marshal's deputies arrested Verdugo near Calexico, California, pursuant to the outstanding arrest warrant. The Marshal's deputies subsequently transferred custody of Verdugo to agents from the Calexico field office of the Drug Enforcement Administration (DEA). After obtaining biographical information from Verdugo, DEA agents transported him, by aircraft, to the Metropolitan Correctional Center in San Diego.

After Verdugo's arrest, Terry Bowen, the Resident Agent in Charge of the DEA office in Calexico, decided to arrange for searches of two residences, located in Mexicali and San Felipe, Baja California. Based upon his own surveillance, reports prepared by other DEA agents, and reports from confidential informants, Bowen believed that the house in Mexicali was Verdugo's principal residence. While Bowen had never personally observed the house in San Felipe, reports from confidential informants indicated that it too belonged to Verdugo. Bowen believed that searches of these residences would disclose cash proceeds from Verdugo's alleged narcotics transactions, as well as documentary evidence of such transactions, including drug ledgers and telephone and address books identifying trafficking associates.

Bowen also knew Verdugo to be a suspect in the investigation of the kidnap and murder of DEA Special Agent Enrique Camarena Salazar, and intended to seize any evidence relevant to that investigation which the searches disclosed.

At the time of his decision to conduct the searches of Verdugo's residences, Bowen had been a federal law enforcement officer for eighteen years and had participated in "hundreds" of searches in Mexico. In approximately 10 to 15 per cent of these searches, Bowen himself had seized evidence for subsequent use by a United States law enforcement agency. To his knowledge, however, such seized evidence had never been actually admitted as evidence in a United States court during a criminal prosecution. His express objective in conducting the immediate searches was to obtain evi-

dence for use against Verdugo in the pending United States prosecution. Despite his inexperience with the use of such foreign seized evidence in a United States prosecution, Bowen did not discuss the searches with anyone prior to making his decision. Bowen alone made the decision to conduct the searches.

Bowen telephone Walter White, the Assistant Special Agent in Charge of the DEA office in Mexico City. White's duties included overseeing DEA enforcement operations within the Republic of Mexico; he also supervised the five resident DEA offices located within the Republic of Mexico. Bowen informed White of Verdugo's arrest, and stated that he would like to search Verdugo's two Baja residences for documentary evidence of Verudgo's alleged narcotics trafficking activities. Bowen asked White to contact

Florentino Ventura, the Director General of the Mexican Federal Judicial Police (MFJP), and ask Ventura to authorize the searches and instruct the local MFJP comandante in Mexicali to cooperate with and assist the DEA agents during the searches. White was aware, and Bowen reminded him during their telephone conversation, that Verdugo was a suspect in the Camarena investigation. White did not ask Bowen whether he had obtained permission from the Department of Justice for the searches and indicated that such permission was not a matter he was concerned with.

After his conversation with Bowen, White telephoned a Mr. Ortega Padilla, the Second Deputy Attorney General for the Republic of Mexico, but was unable to reach him. White then telephoned Director Ventura, but was also unable to

reach him. Because it was now late in the evening on January 24, White decided to wait until the next morning to continue his efforts to obtain authorization for the searches, and made no further telephone calls.

The following morning, White again telephoned Ortega Padilla's office. Unable to reach him at his office, White then telephoned Ortega Padilla's residence and learned that the Deputy Attorney General was away for the weekend. White telephoned Ventura, who was in, and informed him that Verdugo had been arrested near Calexico by United States law enforcement officers. He told Ventura that DEA agents in Calexico believed that Verdugo's Baja residences contained relevant documentary evidence, and that they wanted permission to search the residences. Ventura author-

ized the searches, and said that Bowen should tell the MFJP comandante in Mexicali that the searches had been authorized and that the local MFJP officers were to cooperate with and assist the United States agents. White then telephoned Bowen, and informed him that Ventura had given permission for the searches.

While waiting for White's return call, Bowen had notified DEA Special Agents Ricardo Ramos, Robert Martinez, and Michael O'Brien that Verdugo had been arrested and that the agents might be needed to conduct a search of Verdugo's residences in Mexico. Bowen told the agents that should the searches occur, they were to seize documentary evidence relevant to Verdugo's alleged narcotics trafficking activities. The agents were already aware that Verdugo was a suspect

in the Camarena murder and understood that there were also to seize any documentary evidence relevant to that investigation.

Bowen received White's return telephone call at approximately 1:00 or 1:30 p.m. on January 25. Bowen and the three DEA agents then drove, in two DEA vehicles, to the MFJP office in Mexicali. Prior to leaving the DEA office in Calexico, Bowen did not contact the United States Attorney's Office in San Diego or the Department of Justice in Washington D.C. in order to obtain authorization for the searches or to seek advice as to their legality. In Mexicali, Bowen informed MFJP Comandante Enrique Salazar-Ramos that Verdugo had been arrested near Calexico, that the DEA believed his residences in Mexicali and San Felipe contained documentary

evidence of his alleged narcotics trafficking activities, and that MFJP Director General Ventura had authorized searches of the two residences and stated that the local MFJP officers were to assist the DEA agents in conducting the searches. Bowen did not mention to Salazar that Verdugo was also a suspect in the Camarena investigation. Salazar said that he would have to verify Bowen's statements and, in the presence of DEA agents, placed a telephone call. The DEA agents overheard Salazar speaking with another individual over the telephone. After he finished the conversation, Salazar said that "everything was fine," but that he wanted to speak with the "Delegado" before conducting the searches. Salazar then left the MFJP office. When he returned a few minutes later, Salazar again said that every-

thing was fine and indicated that the searches would occur. DEA Agent Ramos, who is licensed as an attorney in Mexico, testified that a delegado is a Mexican attorney who functions as the local representative of the Mexican Attorney General, and that his duties include supervising the local MFJP officers. Ramos also testified that the office of the Mexicali Delegado is in the same building as the office of the MFJP.

Salazar assembled approximately 10 to 15 MFJP officers to conduct the searches, and instructed some of the MFJP officers to ride with the DEA agents in their vehicles. Prior to leaving for Verdugo's residences, Salazar informed Bowen that the DEA would be permitted to take any documentary items believed to be evidence back to the United States. The DEA-MFJP group then drove to the

Mexicali residence believed to belong to Verdugo, arriving there after dark. Upon arriving at the residence, several MFJP officers were stationed around the perimeter of the residence. The DEA agents remained in the street while Salazar, accompanied by an entry team comprised entirely of MFJP officers, approached the front door. Salazar knocked on the door, and when no one answered, he or one of the MFJP officers with him broke a pane of glass in the door, reached in, and unlocked the door from the inside. As Salazar entered the house, he turned and waved approximately eight MFJP officers and the DEA agents into the house.

Once inside, the MFJP officers conducted a security sweep to determine whether anyone was in the house. While the DEA agents did not actively participate in the sweep, they apparently wandered

throughout the house. Agent Martinez observed MFJP officers opening drawers and closets during the security sweep. None of the DEA agents, however, participated in any search of the residence at this time. Salazar and Bowen, meanwhile, were discussing how to proceed with the search. Because it was already dark, and because it was approximately a two hour drive to San Felipe, Salazar decided to leave four or five MFJP officers at the Mexicali residence to secure it, and proceed immediately to San Felipe with DEA agents and remaining MFJP officers. Salazar instructed the MFJP officers who remained at the Mexicali residence that they were not to search the residence until he and the DEA agents returned.

The group arrived in San Felipe in the evening after nightfall. Using a map of the town, Bowen directed the group to a

residence which, based upon informants' reports, he believed belonged to Verdugo. The DEA agents and the majority of the MFJP officers remained at the perimeter of the house while Salazar and two of his MFJP officers approached the front door. Salazar knocked on the door and was admitted by the occupants. Thereafter, Bowen, Ramos, Martinez, and a number of the MFJP officers formerly stationed on the perimeter of the property entered the house as well. Inside the house were some women--the testimony of the DEA agents differed as to whether there were two or three or four. In response to Salazar's questions, one of the women, later identified as Yolanda Tafoya, denied that the house belonged to Verdugo or that she even knew Verdugo. One of the MFJP officers spotted a letter or other piece of paper

bearing Verdugo's name on a nearby counter. When confronted with the letter, Tafoya acknowledged that she knew Verdugo and that her husband worked for him. MFJP officers then conducted a brief search, lasting several minutes, of the Tafoya residence. None of the DEA agents participated in this search, and nothing seized by the MFJP officers was turned over to the DEA.

Tafoya's husband Raymundo then arrived at the house and told the officers and agents that Verdugo owned a beach house at Playa del Sol, some two to three miles away. Raymundo Tafoya accompanied the agents and officers as they drove to Playa del Sol, and identified the beach house. The beach house was, in fact, several buildings surrounding a recreational area. The complex was locked, dark, and apparently unoccupied. Tafoya

indicated that a caretaker had a key to the complex. Nonetheless, one of the MFJP officers entered one of the buildings through a window, and then unlocked the front door from the inside. Salazar, "at least two" MFJP officers, and the four DEA agents entered the building and commenced a search of the entire complex. The majority of the MFJP officers remained outside, stationed on the perimeter of the complex as guards.

The search of the Playa del Sol complex lasted approximately two hours. The exact nature of the DEA participation in this search is a little unclear. Agent Ramos' testimony suggests that the MFJP officers alone actually conducted the search, and that the DEA agents simply followed the MFJP officers throughout the complex. The testimony of agents Bowen and Martinez, however, indicates

that the DEA agents actively participated in the search itself, both in terms of actually looking for relevant documentary items and identifying as relevant those documentary items discovered by MFJP officers. This court finds that the search occurred as suggested by the testimony of agents Bowen and Martinez.

During the search, items were placed in separate containers according to which agency seized them. The officers and agents completed the search shortly before midnight. All seized documentary items were then put into plastic bags, turned over to DEA agents, and placed in one of the DEA vehicles. Seized weapons were kept by the MFJP. MFJP officers also seized a 1984 Grand Marquis automobile and some three-wheeled vehicles. No inventory of seized items was prepared by the DEA agents prior to leaving the

residence, and they left no receipt or other notice that the residence had been searched and items had been seized.

The officers and agents then returned to Mexicali, arriving at the previously secured residence approximately two hours after leaving San Felipe. The MFJP officers who had been left at the Mexicali house remained outside the house, acting as guards. The remaining MFJP officers, Salazar, and the four DEA agents entered the house. Again, there is some ambiguity as to the nature and scope of DEA participation in the search. Based primarily upon the testimony of Agents Bowen and Martinez, the court finds that Salazar, "at least two or three" MFJP officers, and three of the four DEA agents conducted a room by room search of the residence for documentary evidence. The DEA agents seized

documents they believed were relevant, while documents seized by MFJP officers were shown to Bowen for a decision as to their relevance. The agents and officers placed seized documents in separate containers according to the room from which they had been seized, and these containers were placed in the DEA vehicles. Again, the MFJP kept all seized weapons.

Two hours into the search, at approximately 3:30 or 4:00 a.m., Bowen was searching a cabinet area in the back portion of the house. The cabinets contained several brief cases and folders full of papers. Salazar was seated in a nearby chair as Bowen reviewed documents, differentiating between those that were relevant and those that were not. Salazar got up from his chair, placed all of the remaining documents in

a single briefcase, and told Bowen to take all of them and sort them out later. Salazar indicated that it was late, he was tired, and he did not want the search to continue any longer. Bowen placed the briefcase full of papers in one of the DEA vehicles along with the containers of papers previously seized.

The MFJP officers and DEA agents then left the Mexicali residence. The DEA agents returned to the United States with the seized documents. The agents then prepared inventories and the appropriate DEA reports identifying and describing the seized documents. All documents seized during the searches remain in the custody of the government, and are currently stored in both Calexico and San Diego.

II. DISCUSSION

Verdugo moves to suppress all evidence seized during the searches of his residence in Mexicali and Playa del Sol. He argues that the searches of these residences violated the Fourth Amendment.

A. General Applicability of the Fourth Amendment

Neither the Fourth Amendment nor the exclusionary rule apply to foreign searches conducted by foreign officials. Stonehill v. United States, 405 F.2d 738, 743 (9th Cir. 1968), cert. denied, 395 U.S. 960 (1969); See Brulay v. United States, 383 F.2d 345, 348 (9th Cir.), cert. denied, 389 U.S. 986 (1967). The rationale underlying this rule is twofold: the Fourth Amendment is directed at the United States government and it agencies and not at foreign gov-

ernments and agencies, and the exclusion of evidence in a United States prosecution will have little deterrent effect on the conduct of foreign law enforcement officials. Brulay, 383 F.2d at 348. An exception to the rule, however, occurs when the United States agents substantially participate in a search so as to convert it into a joint venture between United States and foreign officials. When such a joint venture exists, the Fourth Amendment and the exclusionary rule apply. Stonehill, 405 F.2d at 743; cf. United States v. Emery, 591 F.2d 1266, 1267-1268 (9th Cir. 1978) (requiring Miranda warnings prior to foreign interrogation conducted as joint venture between United States and foreign officials).

The facts discussed above compel a finding that the immediate searches were

conducted as a joint venture between United States and Mexican law enforcement officials. The DEA agents initiated the searches in order to obtain evidence relevant to a criminal prosecution pending in the United States. The searches were unrelated to any pending or contemplated Mexican criminal prosecution and would not have been conducted by the MFJP absent encouragement from the DEA. Bowen himself testified that the searches were "DEA initiated" and that the MFJP had no independent interest in the searches. Comandante Salazar appeared reluctant to conduct the searches absent approval from Director Ventura, approval which had been previously requested and obtained by the DEA. The DEA agents participated extensively in the searches themselves, both in terms of searching for relevant documents and identifying

as relevant documents discovered by MFJP officers. Finally, MFJP officers did not take initial custody of seized documents or otherwise inventory or process them according to MFJP procedures. Instead, the DEA agents took immediate custody of all seized documents and transported them at once to the United States, where they were inventoried and processed according to DEA procedures for use in a DEA investigation. These facts, considered together, indicate an affirmative participation in the planning and execution of the searches far removed from the passive or peripheral role of the United States agents in searches where no joint venture was found. See e.g., Stonehill, 405 F.2d at 746; United States v. Rose, 570 F.2d 1358, 1362 (9th Cir. 1978); United States v. Benedict, 647 F.2d 928, 930-31 (9th Cir.), cert. denied, 454 U.S. 1087 (1981).

Verdugo's Mexican citizenship, however, presents an issue apparently not yet addressed by the Ninth Circuit. Reported decisions in this circuit applying the joint venture rule to foreign searches have apparently involved only foreign searches of United States citizens. See, e.g., Stonehill, 405 F.2d at 740; Rose, 750 F.2d at 1361; Benedict, 647 F.2d at 929. None of the cases cited to or discovered by the court expressly address the situation presented by the immediate case: whether the Fourth Amendment applies to a foreign search of a foreign national conducted as a joint venture by United States and foreign officials.

The extent to which the Constitution protects aliens from our government's

conduct abroad is unclear and depends upon whether the interest asserted by the alien is within the intended scope of the constitutional provision upon which he relies. Cardenas v. Smith, 733 F.2d 909, 914-17 (D.C. Cir. 1984). The Second Circuit has held that the Fourth Amendment limits the conduct abroad of United states agents which affects foreign nationals. United States v. Toscanino, 500 F.2d 267, 280 (2nd Cir. 1974) (Italian citizen may raise Fourth Amendment challenge to legality of Uruguayan wiretap conducted by United States agents); accord Jean v. Nelson, 727 F.2d 957, 973 (11th Cir. 1984) (characterizing modern judicial trend as permitting aliens who are victims of unconstitutional government conduct abroad to assert the Constitution if the government seeks to use the

fruits of its illegal conduct in a United States criminal prosecution), aff'd on other grounds, 105 S.Ct. 2992 (1985). Cases involving Coast Guard searches of vessels outside the territorial waters of the United States have also permitted foreign nationals to raise Fourth Amendment challenges. United States v. Cortes, 588 F.2d 106, 110 (5th Cir. 1979) ("once aliens become subject to liability under United States law, they also have a right to benefit from its protection"); United States v. Demanett, 629 F.2d 862, 866 (3rd Cir. 1980), cert. denied, 450 U.S. 910 (1981); cf. United States v. Rubies, 612 F.2d 397, 404 (9th Cir. 1979) (assuming, but not deciding, that aliens may raise Fourth Amendment challenge to searches of vessels which occur outside territorial waters), cert. denied, 446

U.S. 940 (1980). The holdings of the above cases are especially applicable to the immediate searches. It seems unlikely that the Fourth Amendment was not intended to protect an alien, already in the custody of the United States and charged in a criminal complaint, from searches of his foreign residences conducted by United States agents for the express purpose of obtaining evidence relevant to the pending prosecution. Accordingly, the court holds that the Fourth Amendment applies to the searches, conducted as a joint venture between United States and Mexican officers, of Verdugo's residences in Mexicali and Playa del Sol, notwithstanding Verdugo's Mexican citizenship.

B. Applicability of the Warrant Clause

The issue that remains is what application of the Fourth Amendment means in the context of these searches. The government concedes that the two immediate searches were without a warrant, Mexican or otherwise, and has demonstrated no exigent circumstances which would ordinarily permit a warrantless search of a residence. The government argues, however, that should the Fourth Amendment apply, it cannot be applied literally to require a warrant. Obtaining a warrant was impracticable, the government contends, since the availability of a Mexican warrant at the time of the searches was "uncertain" and the availability of a United States warrant was and is limited by Fed.R.Crim.P. 41(a), which requires a warrant to be issued in the

district in which the property subject to seizure is located.

Article 16 of the Mexican Constitution seems to require on its face, a warrant similar to that required by the Fourth Amendment before search of a residence is permissible. The government has not demonstrated that obtaining a warrant pursant to Article 16 was either impossible or even impracticable. Agent Bowen's testimony that he had never conducted a search with the MFJP where a warrant was obtained does not indicate that a warrant was unnecessary or could not be obtained. Had either Bowen or White contacted the United States Attorney's Office in San Diego or the Department of Justice in Washington, D.C., they might have learned that the Fourth Amendment might restrict DEA searches in Mexico. Had they thereafter discussed this problem with Director Ventura or Deputy Attorney General Ortega Padilla, they might have learned that a warrant which complied with the Fourth Amendment could be obtained pursuant to Article 16 even though, as a practical matter, Mexican law enforcement officers seldom felt constrained to do so. This failure to make inquiries, coupled with the government's failure to present any other proof demonstrating that obtaining a Mexican warrant was impossible or impracticable, prevents a finding that a Mexican warrant complying with the Fourth Amendment was in fact unavailable. Absent such a showing, the court is disinclined to restrict application of the warrant clause of the Fourth Amendment because of the "uncertain" availability of a Mexican warrant. Cf. Toscanino, 500 F.2d at 280 (where Fourth Amendment

applies overseas, that the foreign country which is the site of the search does not afford a procedure for issuance of a warrant does not excuse compliance with the warrant requirement).

With respect to the government's second contention, that a United States warrant was unavailable, Fed.R.Crim.P. 41(a) provides that

> a search warrant authorized by this rule may be issued by a federal magistrate or a judge of a state court of record within the district wherein the property or person subject to seizure is located, upon request of a federal law enforcement officer or an attorney for the government.

Thus, Fed.R.Crim.P. 41(a) does not empower a federal magistrate or a state judge within the Southern District of California to issue a warrant authorizing searches of residences located in Mexico. Several courts have held, however, that whatever limitations

Fed.R.Crim.P. 41 as a whole places on the warrant authority of a federal magistrate or state judge, it does not limit the inherent power of a federal court of general jurisdiction to issue warrants which conform to the Fourth Amendment. In United States v. Torres, 751 F.2d 875 (7th Cir. 1984), cert. denied, 105 S.Ct. 1853 (1985), a district court judge issued a warrant authorizing video surveillance of a residence used by a Puerto Rican terrorist group to manufacture explosives. The Seventh Circuit affirmed the power of the district court to issue such a warrant, despite the fact that Fed.R.Crim.P. 41(b), by its terms, permits a magistrate to issue only warrants authorizing seizure of tangible property and persons. The court derived this power to issue video surveillance

warrants from both a "flexible" construction of Fed.R.Crim.P. 41(b) itself, and the inherent power of the district court to issue warrants which conform to the Fourth Amendment. Id. at 878-879. Other courts have also used the inherent power theory to justify district court warrants not specifically provided for by Fed.R.Crim.P. 41. United States v. Biasucci, 786 F.2d 504, 509 n.6 (2nd Cir.) (following Torres), cert. denied, 107 S.Ct. 104 (1986); United States v. Ianniello, 621 F.Supp. 1455, 1467 (S.D.N.Y. 1985) (following Torres); see United States v. New York Telephone Co., 434 U.S. 159, 168 n.14 (1977) (acknowledging, without disapproval, that some courts of appeal [sic] had derived authority for judicial orders authorizing telephone pen registers from an inherent power

"closely akin" to Fed.R.Crim.P. 41 which permits issuance of warrants under circumstances conforming to the Fourth Amendment); United States v. Freitas, 610 F.Supp. 1560, 1570 (N.D. Cal. 1985) (suggesting that inherent power theory would permit district court warrant authorizing surreptitious entry and visual observation of clandestine methamphetamine laboratory), rev'd on other grounds, 800 F.2d 1451 (9th Cir. 1986); Fed.R.Crim.P. 57 ("in all cases not provided for by these rules, district judges and magistrates may regulate their practice in a manner not inconsistent with these rules").

Only one reported decision has apparently used the inherent power theory to address the specific problem, created by overseas application of the Fourth Amendment, of the gap between

Fed.R.Crim.P. 41(a) and the warrant clause. In Berlin Democratic Club v. Rumsfeld, 410 F.Supp. 144 (D.C. 1976), a group of United States dissidents living in West Germany filed a civil action against the Secretary of Defense and other United States officials which alleged various Fourth Amendment causes of action. Plaintiffs claimed that United States military personnel overseas had conducted warrantless electronic surveillance of their political meetings and other activities. Defendants moved to dismiss the complaint, arguing in part that the warrant clause was inapplicable to overseas wiretaps since no United States magistrate was empowered to issue an overseas warrant. The district court acknowledged that Fed.R.Crim.P. 41(a) restricts a magistrate's power to

warrants authorizing seizure of persons or property located within his district. The court nonetheless rejected defendants' argument, noting that

> Rule 41(a) cannot limit or restrict the dictates of the Constitution to the United States, . . . particularly when the Supreme Court has held those dictates applicable overseas. Reid v. Covert, supra. The court's authority over federal officials is sufficient to require an official to present for approval in the United States a warrant for a wiretap overseas.

Id. at 160; accord United States v. Williams, 617 F.2d 1063, 1099 (5th Cir. 1980) (en banc) (concurring opinion) (United States courts have inherent power to issue warrants authorizing searches of vessels outside United States territorial waters); United States v. Egan, 501 F.Supp. 1252. 1273 (S.D.N.Y. 1980) (same holding as Williams). While the court's reference in Berlin Democratic Club to its authori-

ty over federal officials is somewhat conclusory, it is consistent with other cases, mentioned above, which discuss the theory of a district court's inherent power to issue warrants which conform to Fourth Amendment standards.

The Government might argue that implying such a power to issue an overseas warrant is impermissible since it infringes upon the sovereignty of the nation where the search is to occur. The Fourth Amendment's general requirement of reasonableness, however, would certainly require, prior to the execution of any overseas warrant, that the search authorized by the warrant be approved by the appropriate foreign official. Such a procedure, had it been utilized in the immediate case, would have been no more intrusive upon the sovereignty of Mexico that the warrantless search authorized

by Ventura after White's informal telephonic request for permission to search.

Based upon the foregoing authority, the court feels that a United States District Court has the inherent power, notwithstanding the limitations placed upon federal magistrates and state judges by Fed.R.Crim.P. 41(a), to issue warrants both authorizing and properly limiting, according to constitutional principles, overseas searches. The appropriate district in which to seek such a warrant would include the district having jurisdiction of the criminal offense involved. Thus, the DEA agents involved in the immediate searches could and should have attempted to obtain warrants from the District Court for the Southern District of California prior to conducting searches of Verdugo's residences in Mexicali and Playa del Sol. Since they

did not, the immediate searches were unconstitutional warrantless searches of a residence.

The court notes that even if it were to find that Fed.R.Crim.P. 41(a) precludes a United States court from issuing an overseas warrant, compliance with the warrant clause could not, solely because of the unavailability of a warrant, be excused. In the context of a warrantless search, conducted by United States military personnel, of a United States citizen's apartment in post-war occupied Austria, the First Circuit discussed a relevant hypothetical:

> For present purposes we assume, and we think it is probably so, that the protection of the Fourth Amendment extends to United States citizens in foreign countries under occupation by our armed forces. [citations omitted] . . . For example, suppose A, a citizen of the United States, goes to Germany to take employment in a civilian capacity under the High Commissioner. He is suspected

> of having previously transported stolen goods in interstate commerce, in violation of 18 U.S.C. Section 2314. Agents of the F.B.I. without any search warrant, break into A's dwelling in Germany, ransack the place, find and seize the alleged stolen goods. Upon a subsequent prosecution of A in the United States for that offense, it can hardly be doubted that the evidence so obtained would be excluded as the product of a search and seizure forbidden by the Fourth Amendment. And this would be even though no judicial officer had been authorized to act on an application for a warrant. Obviously, Congress may not nullify the guarantees of the Fourth Amendment by the simple expedient of not empowering any judicial officer to act on an application for a warrant. If the search is one which would otherwise be unreasonable, and hence in violation of the Fourth Amendment, without the sanction of a search warrant, then in such a case, for lack of a warrant, no search could lawfully be made.

United States v. Best, 184 F.2d 131, 138 (1st Cir. 1950), cert. denied, 340 U.S. 939 (1951). In Best, the court ultimately held that the Fourth Amendment permitted the warrantless search, given the drastic circumstances of the

immediate post-war military occupation of Austria. Id. at 138-141. The initial example discussed by the Best court, however, remains relevant to foreign searches conducted in the absence of a state of war, and has been cited with approval by the Second Circuit. Toscanino, 500 F.2d at 280.

The example discussed in Best involved United States conduct abroad which implicated the Fourth Amendment rights of a United States citizen. This case involves United States conduct abroad which implicates the Fourth Amendment rights of an alien. As discussed previously, however, there is no meaningful way to distinguish between overseas application of the Fourth Amendment to a United States citizen and overseas application of the Fourth Amendment to an alien already in the custody of the

United States and subject to prosecution under our criminal laws. The Fourth Amendment, which therefore applies to the immediate searches, requires, prior to the search of a residence, a written warrant or exigent circumstances which excuse the warrant requirement. The government has proffered no exigent circumstances recognized by current Fourth Amendment case law which would justify the warrantless searches of Verdugo's residences. The argument that Congress has not expressly authorized any judicial officer to issue the overseas warrant required by the Fourth Amendment cannot, by itself, excuse compliance with the Fourth Amendment. If the government is not empowered to act constitutionally, it simply cannot act. See Reid v. Covert, 354 U.S. 1, 6 (1956). To hold otherwise would permit

Congress to restrict the Constitution through legislation which, as our history fortunately indicates, places the cart before the horse.

Finally, the government urges in its opposition that should the warrant clause apply, the court should nonetheless refuse to suppress the evidence, applying the good faith exception to the exclusionary rule established by the Supreme Court in United States v. Leon, 468 U.S. 897 (1984). The government argues that the exclusionary rule should not apply where United States officers conducting a foreign search follow their foreign counterparts and reasonably believe that they are proceeding lawfully. The Court's holding in Leon applies only to searches pursuant to a facially valid warrant later determined to be invalid. Id. at 922. As

indicated during oral argument, this court will not extend Leon to a warrantless search absent clear authority from either the Ninth Circuit or the Supreme Court.

In any event, it is doubtful that the DEA agents' belief in the lawfulness of the searches, whether in good faith or not, can be considered reasonable. Neither Bowen nor White, the two senior agents involved in the searches thought it necessary to seek either legal advice or legal authorization regarding the searches from the local United States Attorney's Office or the Department of Justice. Had they sought such advise, they would presumably have learned that the searches implicated Verdugo's Fourth Amendment rights and that warrants might be necessary for the searches to be lawful. Bowen's failure to seek this

advise, despite his inexperience with the use of foreign-seized evidence in a United States prosecution, and despite the importance of the investigation which provided at lease [sic] some of the motivation underlying the searches, renders his belief in the legality of the searches unreasonable under the Leon standard.

C. Reasonableness of the Execution of the Searches

Even if the court were to accept the government's argument and find noncompliance with the warrant clause excused, the searches nonetheless still violated the Fourth Amendment. An initially valid search may be subsequently invalidated if its execution is unconstitutionally unreasonable. See United States v. Penn, 647 F.2d 876, 882-883 (9th Cir. 1980). Whatever the initial lawfulness

under the Fourth Amendment of these warrantless foreign searches, several factors compel a finding that the subsequent execution of the searches was unreasonable.

While the initial entry of the Mexicali house occurred during the late afternoon or early evening, the bulk of the searches of both residences occurred between the hours of 10:00 p.m. and 4:00 a.m. The government has demonstrated no specific exigent circumstances which would justify the invasion of privacy which a search during these hours creates. United States v. Searp, 586 F.2d 1117, 1122 (6th Cir. 1978) (Fourth Amendment prohibits nighttime search absent exigent circumstances justifying such a search) cert. denied, 440 U.S. 921 (1979); see United States v. Stefanson, 648 F.2d 1231, 1236 (9th

Cir. 1981) (Fed.R.Crim.P. 41 requires warrant authorizing nighttime execution to be based upon affidavit reciting specific facts justifying nighttime execution).

During the searches, the DEA agents did not prepare contemporaneous inventories of the items seized. They therefore did not leave receipts at the searched residence which would have notified the residents that a search had occurred and that various specific items had been seized as evidence of narcotics trafficking. See Fed.R.Crim.P. 41(d) (officer executing warrant issued pursuant to Fed.R.Crim.P. 41 must leave receipt describing property seized at searched residence).

Finally, the searches themselves were unconstitutionally general in their scope. While Bowen himself apparently

had a fairly precise idea of the type of documentary evidence he hoped to find, he told his fellow DEA agents and the cooperating MFJP officers only that they were to seize documentary evidence relevant to Verdugo's alleged narcotics trafficking activities. No written descriptions of the precise documentary items sought were prepared or given to either the DEA agents or the MFJP officers. The search proceeded according to Bowen's oral instructions, with the agents and officer seizing any documents that appeared relevant. Such a search through all documents found within a residence, not limited by any precise written or oral descriptions of the type of documentary items sought, constituted an unconstitutional general search.

III. ORDER

Verdugo's motion to suppress evidence seized during the searches of his residences in Mexicali and Playa del Sol is granted.

IT IS SO ORDERED.

DATED: February 5, 1987.

/s/ J. Lawrence Irving

J. LAWRENCE IRVING
UNITED STATES DISTRICT COURT

APPENDIX C

UNITED STATES OF AMERICA,
Plaintiff-Appellant

v.

RENE MARTIN VERDUGO-URQUIDEZ,
Defendant-Appellee

No. 87-5061

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Filed Nov. 14, 1988

ORDER

Before WALLACE, NORRIS and THOMPSON, Circuit Judges.

A majority of the panel, as constituted above, has voted to deny the petition for rehearing. Judge Wallace voted to grant the petition for rehearing. The panel has voted unanimously to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no

judge of the court has requested a vote on the suggestion for en banc rehearing. Fed.R.App.P. 35(b).

The petition for rehearing is DENIED, and the suggestion for rehearing en banc is REJECTED.

REPLY

BRIEF

(3)

No. 88-1353

Supreme Court, U.S.
FILED
APR 17 1989
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1988

UNITED STATES OF AMERICA, PETITIONER

v.

RENE MARTIN VERDUGO-URQUIDEZ

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

WILLIAM C. BRYSON
Acting Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-1353

UNITED STATES OF AMERICA, PETITIONER

v.

RENE MARTIN VERDUGO-URQUIDEZ

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

The question presented in this case is whether evidence seized from the overseas residence of a foreign national must be suppressed under the Fourth Amendment because the United States law enforcement officers who conducted the seizure—in conjunction with, and with the approval of, foreign officials—did not have a search warrant. The court of appeals answered that question in the affirmative. It reasoned that "[t]he Constitution imposes substantive constraints on the federal government, even when it operates abroad" (Pet. App. 8a). Moreover, the court stated, to "relieve the government" of the warrant requirement in this context "would be to treat foreign searches differently from domestic searches just because they are foreign" (*id.* at 35a). In our petition, we explained why we believe that the court of appeals' decision is wrong, is at odds with decisions of this Court and of other courts of appeals, and presents a recurring question of substantial importance to American law enforcement overseas.

1. For the most part, respondent does not defend the court of appeals' decision on its own terms. He contends, instead, that the judgment below may be upheld on two other grounds, not addressed by the court of appeals. Relying on those alternative grounds, respondent urges the Court not to review the question presented.

a. Respondent first notes (Br. in Opp. 27-28) that at the conclusion of the Mexicali search Commandante Salazar placed the remaining documents in a briefcase and directed the DEA agents to complete their examination of those documents at a later date. Respondent asserts that when, after returning to the United States, the agents opened the briefcase to complete their examination, without first securing a search warrant, they committed an independent violation of the Fourth Amendment, wholly apart from the initial seizure in Mexicali. In light of that subsequent violation of the Fourth Amendment, respondent contends that the Court "need not determine the question presented by petitioner" (*id.* at 33). That contention is meritless for two reasons.

First, respondent does not and cannot show that the tally sheet—which is the only document seized from respondent's residence that the government seeks to offer at trial (see Pet. App. 29a)—was in fact one of the documents that Salazar placed in the briefcase. The lower courts made no such finding, and there is no evidence in the record to support such a finding.[1]

[1] If anything, the evidence suggests just the opposite. The documents placed inside the briefcase at Salazar's direction were seized from "the back area of the house where there [were] some large cabinets with shelves" (10/23/86 Tr. 346). By contrast, in a related prosecution of one of respondent's confederates, the government has adduced evidence showing that the tally sheet was found inside a briefcase in a closet just off the master bedroom in the Mexicali residence. See *United States* v. *Jones*, No. 86-0961, 6/11/87 Tr. 1239-1241.

Second, even if the tally sheet was in fact contained in the briefcase, the Fourth Amendment would not prohibit the agents from opening the briefcase upon their return to the United States. As the trial court found (Pet. App. 89a), Agent Bowen was already in the process of examining the remaining documents when Commandante Salazar placed them in the briefcase. And as this Court explained in *United States* v. *Jacobsen*, 466 U.S. 109 (1984), "[t]he Fourth Amendment is implicated only if the authorities use information with respect to which the expectation of privacy has not already been frustrated" (*id.* at 117). "Merely inspecting [documents] that c[o]me into view during [an earlier] search [does] not * * * constitute[] an independent search, because it * * * produce[s] no additional invasion of respondent's privacy interest." *Arizona* v. *Hicks*, 480 U.S. 321, 325 (1987). Because the DEA agents had already seized the documents and had begun to examine them when Commandante Salazar placed them in the briefcase, the agents were not precluded by the Fourth Amendment from reopening the briefcase and completing the examination. Accordingly, if the initial seizure in Mexicali was lawful—and that is the question presented in this case—then the continued examination of the documents in the United States was lawful as well. See also *United States* v. *Felton*, 753 F.2d 256, 260-261 (3d Cir. 1985); *United States* v. *Morgan*, 744 F.2d 1215, 1219-1221 (6th Cir. 1984).

b. Second, respondent urges (Br. in Opp. 48-52) the Court to decline to consider the question presented because "the conduct of DEA agents in conjunction with foreign officials" in "kidnapping" respondent from Mexico violated the Due Process Clause of the Fifth Amendment. But "[t]his Court has never departed from the rule announced in *Ker* v. *Illinois*, 119 U.S. 436, 444 [1886], that the power of a court to try a person for crime is not impaired by the fact that he had been brought within the

court's jurisdiction by reason of a 'forcible abduction.' " *Frisbie* v. *Collins*, 342 U.S. 519, 522 (1952). Accord *United States* v. *Crews*, 445 U.S. 463, 474 (1980); *Gerstein* v. *Pugh*, 420 U.S. 103, 119 (1975). Nor does it matter that respondent was seized in purported "disregard for Mexican, United States and International law" (Br. in Opp. 52). See *Frisbie*, 342 U.S. at 522-523 (the fact that defendant was seized in purported violation of the Federal Kidnapping Act does not bar prosecution). As the Court explained in *Frisbie*, "[t]here is nothing in the Constitution that requires a court to permit a guilty person rightfully convicted to escape justice because he was brought to trial against his will" (*id.* at 522).

This Court's decisions in *United States* v. *Russell*, 411 U.S. 423 (1973), and *Rochin* v. *California*, 342 U.S. 165 (1952), on which respondent relies (Br. in Opp. 48-49), are not to the contrary. In rejecting an entrapment claim in *Russell*, this Court acknowledged that it "may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction" (411 U.S. at 431-432). Similarly, in *Rochin*, the Court held that evidence may be suppressed on due process grounds when the manner in which the government obtains the evidence offends the decencies of a civilized society. Neither case, however, applies by its terms to the manner in which jurisdiction over the defendant is acquired, and neither case calls into question the decisions in *Ker* and *Frisbie*.

Finally, and in any event, the courts that have addressed the defense of outrageous government conduct have emphasized that " 'the due process channel which *Russell* kept open is a most narrow one' " and that "[t]he outrageous government conduct defense is available only where 'the government is so involved in the criminal endeavor that it shocks [the] sense of justice.' " *United States* v. *Stenberg*, 803 F.2d 422, 429 (9th Cir. 1986) (citation omitted). See, *e.g.*, *United States* v. *Nations*, 764 F.2d 1073, 1077 (5th Cir. 1985) (emphasis in original) ("the outrageous government conduct defense is available only upon proof of government *overinvolvement* in the charged crime"); *United States* v. *Tobias*, 662 F.2d 381, 386 (5th Cir. 1981) (same), cert. denied, 457 U.S. 1108 (1982). See also *United States* v. *Kelly*, 707 F.2d 1460, 1468 (D.C. Cir.), cert. denied, 464 U.S. 908 (1983); *United States* v. *Myers*, 692 F.2d 823 (2d Cir. 1982), cert. denied, 461 U.S. 961 (1983). In the present case, the trial court found that "[a]t no time was [respondent] beaten, tortured, physically struck or verbally threatened or tormented" (Excerpt of Record 75). The court accordingly concluded that respondent's apprehension did not rise "to the level of an act so shocking the conscience that dismissal [of the indictment] is warranted" (*id.* at 80).[2]

2. When respondent turns finally to the merits of the question presented, he offers little to contradict the reasons that favor further review by this Court. Respondent contends at length (Br. in Opp. 34-38) that the courts of appeals have applied the Fourth Amendment to searches

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[2] In reaching that result, the trial court distinguished (Excerpt of Record 79-80) the Second Circuit's decision in *United States* v. *Toscanino*, 500 F.2d 267 (1974). In *Toscanino*, the court of appeals held that a defendant was entitled to a hearing on his allegation that he had been apprehended and brought to the United States for trial in violation of due process. Among other things, the defendant in *Toscanino* claimed that he had been knocked unconscious in Uruguay, driven to Brazil, held for some time at gunpoint, denied food and water for an extended period of time, kicked, beaten, subjected to electric shocks throughout his body, and only then placed on a plane destined for the United States. See 500 F.2d at 269-270. No such allegations have been made in the present case.

and seizures conducted as "joint ventures" between American and foreign officials. He does not dispute, however, that both this Court and the D.C. Circuit have broadly rejected the extraterritorial application of the Constitution to claims by foreign nationals. See *United States* v. *Belmont*, 301 U.S. 324, 332 (1937); *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936); *Pauling* v. *McElroy*, 278 F.2d 252, 254 n.3 (D.C. Cir.), cert. denied, 364 U.S. 835 (1960). Respondent also argues (Br. in Opp. 41-45) that aliens within this country have been afforded constitutional protection against certain *domestic* actions taken against them by the government. He does not explain, however, why the Fourth Amendment must therefore be applied to *overseas* searches and seizures of the property of a foreign national.

Finally, respondent fails to come to grips with the impracticability of the Warrant Clause in the context of overseas searches and seizures. He states (Br. in Opp. 53-54) that the Mexican authorities showed "great deference" (*id.* at 54) to an American *arrest* warrant, when they seized respondent and delivered him to the custody of United States officials. Respondent asserts that the readiness of the Mexicans to honor the arrest warrant undermines our view—and the view of the court of appeals, for that matter—that an American *search* warrant "would be a dead letter in Mexico" (Pet. App. 35a). But the circumstances of respondent's arrest by the Mexican authorities proves our point precisely. As the trial court found, the United States agents were required to contact Mexican officials and "persuade[] them to apprehend [respondent]" (Excerpt of Record 75). Although the American agents were thereafter in the vicinity of the arrest, they "did not directly participate in the apprehension" (*ibid.*). Rather, the Mexican authorities planned respondent's arrest and were entirely responsible for its execution.

In short, the execution of respondent's arrest confirms our view (Pet. 14-17) that, in the context of searches and seizures abroad, American agents must defer to the primary authority of their hosts, and that the conventional purposes of a search warrant are therefore rendered largely irrelevant.[3]

For the foregoing reasons and those stated in our petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

WILLIAM C. BRYSON
Acting Solicitor General

APRIL 1989

[3] Respondent suggests (Br. in Opp. 55-56) that the government never argued in the courts below the impracticability of securing an American warrant to search overseas. That is not so. See Government's Response and Opposition to Defendants' Motions, Excerpt of Record 228; Gov't C.A. Br. 18. And both the district court (see Pet. 94a-98a) and the court of appeals (see *id.* at 34a-36a) addressed that issue at length. Moreover, although respondent contends (Br. in Opp. 56-57) that the applicability of the Warrant Clause depends upon "a set of facts incompletely developed at the lower court level" (*id.* at 57), he fails to explain how "the circumstances of the 'seizure' of respondent * * * by Mexican officials" or "the DEA agents' knowledge of the corrupt reputation of the officials" (*id.* at 56) bears on that aspect of the question presented.

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MOTION

MOTION FILED
JUN 7 1989

No. 88-1353

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

UNITED STATES OF AMERICA,

Petitioner,

vs.

RENE MARTIN VERDUGO-URQUIDEZ,

Respondent.

On Writ of Certiorari to the United States Court of Appeal for the Ninth Circuit

MOTION OF AMICUS CURIAE FOR LEAVE TO FILE BRIEF IN SUPPORT OF PETITIONER

KENT S. SCHEIDEGGER*
CHARLES L. HOBSON
Criminal Justice Legal Foundation
2131 L Street
Sacramento, California 95816
Telephone: (916) 446-0345

Attorneys for Amicus Curiae Criminal Justice Legal Foundation

* Attorney of Record

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MOTION OF AMICUS CURIAE FOR LEAVE TO FILE BRIEF IN SUPPORT OF PETITIONER

Pursuant to Supreme Court Rule 36.3, the Criminal Justice Legal Foundation respectfully moves for leave to file the accompanying brief amicus curiae in support of petitioner in the above captioned case. Counsel for petitioner has consented in writing. As of the last day to file the motion and brief amicus has not received written consent from respondent.

INTEREST OF AMICUS

The Criminal Justice Legal Foundation (CJLF) is a non-profit California corporation organized to participate in litigation to the criminal justice system as it affects the public interest. CJLF seeks to bring the due process protection of the accused into balance with the rights of the victim and of society to rapid, efficient and reliable determination of guilt and swift execution of punishment.

The present case involves the unwarranted extension of the Fourth Amendment and judicial scrutiny into the external operations of the United States. Left unchecked, this unnecessary interference would seriously hamper the ability of the United States to conduct criminal investigations abroad. This result is contrary to the rights of victims and society which CJLF was formed to advance.

POINTS TO BE ARGUED

Amicus argues that the Fourth Amendment should not apply to the search of respondent's home because respondent is an alien and the search took place outside the United States. Furthermore, amicus will argue that applying the Fourth Amendment to the search of respondent's house constitutes an unwarranted intrusion of the judiciary into the field of foreign affairs. Finally, amicus argues that the exclusionary rule should not apply to foreign searches of the residences of foreign nationals.

For the foregoing reasons amicus requests leave to file its brief.

Dated: June 1, 1989

Respectfully submitted,

KENT S. SCHEIDEGGER*
CHARLES L. HOBSON

Attorneys for Amicus Curiae
Criminal Justice Legal Foundation

* Attorney of Record

PETITIONER'S

BRIEF

(6)

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CLERK

No. 88-1353

In the Supreme Court of the United States

OCTOBER TERM, 1988

UNITED STATES OF AMERICA, PETITIONER

v.

RENE MARTIN VERDUGO-URQUIDEZ

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

KENNETH W. STARR
Solicitor General
EDWARD S.G. DENNIS, JR.
Assistant Attorney General
WILLIAM C. BRYSON
Deputy Solicitor General
LAWRENCE S. ROBBINS
Assistant to the Solicitor General

Department of Justice
Washington, D.C. 20530
(202) 633-2217

50 pp

QUESTION PRESENTED

Whether evidence seized from the overseas residence of a foreign national must be suppressed under the Fourth Amendment because the United States law enforcement officers who conducted the seizure—in conjunction with, and with the approval of, foreign officials—did not have a search warrant.

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-80a) is reported at 856 F.2d 1214. The opinion of the district court (Pet. App. 81a-103a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 29, 1988. A petition for rehearing was denied on November 14, 1988 (Pet. App. 104a). On January 4, 1989, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including February 12, 1989 (a Sunday). The petition was filed on February 13, 1989, and was granted on April 17, 1989. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT

The district court in this case suppressed evidence seized by agents of the Drug Enforcement Administration (DEA) from the overseas residence of respondent, a Mexican national. The court of appeals affirmed that judgment by a divided vote, holding that the Fourth Amendment, and its Warrant Clause in particular, apply to overseas searches and seizures of property owned by foreign nationals. Because the seizure in this case was effected without a search warrant, the court of appeals upheld the suppression of the seized evidence.

1. Respondent is a citizen and resident of Mexico. On January 24, 1986, federal officers arrested respondent near Calexico, California, pursuant to an arrest warrant charging him with various narcotics offenses. Following respondent's arrest, Terry Bowen, a Drug Enforcement Administration agent assigned to the Calexico DEA office, decided to arrange for searches of respondent's residences in the Mexican cities of Mexicali and San Felipe. Agent Bowen believed that respondent's residences would contain cash proceeds and documents reflecting his participation in narcotics trafficking, as well as evidence of respondent's involvement in the kidnapping and assassination of a DEA agent (for which respondent has since been convicted in a separate prosecution). Pet. App. 81a-82a, 91a.

Bowen first telephoned Walter White, Assistant Special Agent in Charge of the DEA office in Mexico City, and advised him of the proposed searches. Agent Bowen asked White to contact Florentino Ventura, the Director General of the Mexican Federal Judicial Police (MFJP), to secure authorization to conduct the searches and to obtain the assistance of MFJP officers. White twice attempted, without success, to contact Ortega Padilla, the Second Deputy Attorney General for the Republic of Mexico. White then contacted Ventura, advised him of respondent's arrest, stated DEA's belief that respondent's residences would contain relevant evidence, and asked Ventura for permission to search the residences. Ventura authorized the searches and stated that MFJP officers would assist in the operation. Pet. App. 83a-84a.

While awaiting White's return call, Agent Bowen instructed the other DEA agents who would be conducting the searches that they were to seize all documentary evidence relevant to respondent's narcotics activities. The agents also understood that they were to seize evidence relating to the assassination of the DEA agent. After receiving the go-ahead from Agent White, Bowen and the other agents drove to Mexicali. There, they informed MFJP Comandante Enrique Salazar-Ramos that they had been authorized by Director General Ventura to conduct the searches. Salazar explained that he would have to verify that Ventura had indeed authorized the searches. After placing a telephone call, Salazar reported that "everything was fine," but he stated that he wanted to speak with the "delegado" before conducting the searches.[1] Salazar then

[1] At the suppression hearing, a DEA agent, who is also a licensed attorney in Mexico, explained that a "delegado" is a Mexican attorney

left the office; he returned a few minutes later to announce that the searches could proceed. Pet. App. 84a-85a.

Salazar and a group of MFJP officers accompanied the DEA agents to the Mexicali residence. Once there, Salazar and several of the MFJP officers entered the premises. Salazar then instructed the DEA agents to enter as well. The MFJP officers performed a security sweep of the premises. Because it was already late in the day, Salazar decided to leave several MFJP officers at the Mexicali premises, directing them not to search it further at that time. He and several other MFJP officers then left with the DEA agents for the San Felipe residence. Pet. App. 85a-86a.

Once in San Felipe, the agents located respondent's beach house residence. One of the MFJP officers entered the premises through a window and unlocked the front door. A group of MFJP and DEA officers then searched the premises for about two hours. The DEA agents seized certain documents, while the MFJP officers seized a number of firearms and vehicles. Pet. App. 87a-88a.

The agents and officers then returned to the Mexicali residence, entered the premises, and conducted a search. The DEA agents again seized certain documents, while the MFJP officers seized weapons. Among the documents seized by the DEA agents was a tally sheet, which the government believes reflects quantities of marijuana smuggled by respondent into the United States. Pet. App. 6a, 88a-89a.

At about 3:30 a.m., while Agent Bowen was searching a cabinet containing several briefcases of documents, Comandante Salazar decided that it was time to conclude the

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who functions as the local representative of the Mexican Attorney General, and that his duties include supervising the local MFJP officers. Pet. App. 85a.

search. He directed Bowen to take the remaining documents and sort through them later. Bowen complied. After the search was completed, the DEA agents returned to the United States and prepared inventories describing the seized documents. Pet. App. 89a.

2. The district court suppressed the evidence seized from both premises (Pet. App. 81a-103a). The court found at the outset (*id.* at 90a-91a) that the DEA agents had sufficiently participated in the searches to make those searches "a joint venture" between the American and Mexican agents (*id.* at 90a). The court acknowledged, however, that it could find no precedent addressing the question "whether the Fourth Amendment applies to a foreign search of a foreign national conducted as a joint venture by United States and foreign officials" (*id.* at 92a). Nevertheless, the court found it "unlikely that the Fourth Amendment was not intended to protect an alien, already in the custody of the United States and charged in a criminal complaint, from searches of his foreign residences conducted by United States agents for the express purpose of obtaining evidence relevant to the pending prosecution" (*id.* at 93a). Under the Fourth Amendment, the court held (*id.* at 93a-100a), the agents were required to secure a warrant before conducting the searches. The court explained that the Mexican Constitution "seems to require * * * a warrant similar to that required by the Fourth Amendment" (*id.* at 93a-94a); and because the agents had not sought to obtain a Mexican warrant, the court stated that it was "disinclined to restrict application of the warrant clause of the Fourth Amendment" (*id.* at 94a). The court also held that although Fed. R. Crim. P. 41(a) "does not empower a federal magistrate or a state judge within the Southern District of California to issue a warrant authorizing searches of residences located in Mexico" (Pet. App. 95a), a federal court has the "inherent power" (*id.* at 97a)

to do so.[2] Because the agents had not secured a warrant from a United States district court, the court held that the searches of respondent's residences were unconstitutional (*id.* at 98a).[3]

3. The government appealed from the district court's order suppressing the evidence obtained from respondent's Mexicali residence.[4] The court of appeals affirmed by a divided vote (Pet. App. 1a-80a). Quoting from the plurality opinion in *Reid* v. *Covert,* 354 U.S. 1, 5-6 (1957), the court observed at the outset that the United States " 'is entirely a creature of the Constitution' " and therefore " 'can only act in accordance with all the limitations imposed by the Constitution.' " From that premise, the court of appeals surmised that "a proposition of enormous vitality may be drawn: The Constitution imposes substantive constraints on the federal government, even when it operates abroad" (Pet. App. 8a). Applying that principle, the court held that a nonresident alien may invoke the Fourth

[2] The district court acknowledged that the issuance of such a warrant might "infringe[ ] upon the sovereignty of the nation where the search is to occur." It explained, however, that "[t]he Fourth Amendment's general requirement of reasonableness • • • would certainly require, prior to the execution of any overseas warrant, that the search authorized by the warrant be approved by the appropriate foreign official." Pet. App. 97a.

[3] The district court also rejected (Pet. App. 100a-101a) the government's contention that the evidence could be admitted under the good-faith exception to the exclusionary rule. In addition, the court found that the execution of the searches was unreasonable under the Fourth Amendment because (1) the searches were conducted principally at night (Pet. App. 101a-102a); (2) the agents did not prepare contemporaneous inventories of the seized items (*id.* at 102a); and (3) the searches were excessively general in scope (*ibid.*).

[4] The government appealed only from that portion of the suppression order, because it believed that only the evidence seized from the Mexicali residence was critical to the prosecution.

Amendment to challenge the reasonableness of a foreign search. It rejected the contention that because the Fourth Amendment is limited, by its terms, to "the people" of the United States, it does not embrace foreign nationals in connection with overseas searches and seizures (*id.* at 19a-20a). The court also found it "odd indeed" that aliens in this country would be entitled to a fair trial under the Sixth Amendment, and to due process under the Fifth Amendment, but would not be extended the protections of the Fourth Amendment against unreasonable searches and seizures of their property abroad (*id.* at 22a).

Having concluded that respondent could challenge the Mexicali search under the Fourth Amendment, the court next held (Pet. App. 32a-36a) that the search was constitutionally unreasonable for want of a warrant.[5] The court recognized that "a warrant issued by an American magistrate would be a dead letter in Mexico" and that "it would be an affront to a foreign country's sovereignty if the DEA presented an American warrant and suggested that it gave the American agents all the authority they needed to search a foreign residence" (*id.* at 35a). But the court nonetheless refused to "relieve the government" of the warrant requirement (*ibid.*). "To do so," the court stated, "would be to treat foreign searches differently from domestic searches just because they are foreign" (*ibid.*). The court saw no basis "to amputate from the body of th[e] [Fourth Amendment] protection the appendage that requires a detached magistrate's advance determination of probable cause and the issuance of a warrant," even with respect to a foreign search (*id.* at 35a-36a). And although

[5] The court of appeals also upheld the district court's finding that the DEA agents' participation in the Mexicali search was sufficient to make it a "joint venture" with the Mexican officials. Pet. App. 23a-32a.

the court acknowledged that an American warrant "would be of no legal validity in Mexico," the court concluded that it would still "have substantial constitutional value in this country" because it would "reflect the magistrate's determination that probable cause to search existed" and would "define the scope of the search" (*id.* at 36a). The court therefore affirmed the order suppressing the evidence that had been seized from respondent's Mexicali home.[6]

Judge Wallace dissented (Pet. App. 36a-80a). In his view, the Fourth Amendment does not apply to the search of foreign property belonging to a foreign national. Judge Wallace explained that the protections of the Fourth Amendment are limited, by their terms, to "the people"—a class, he stated, that does not include foreign nationals with respect to overseas searches (*id.* at 38a-39a). More generally, Judge Wallace found (*id.* at 39a-45a) that the Constitution is itself designed as a "social compact" between the government and " 'the people of the United States.' " The latter group, he explained, includes only "American citizens at home and abroad and aliens within our country's borders who are victims of actions taken *in the United States* by American officials" (*id.* at 46a (emphasis in the original)). By contrast, he noted, there is no support for the proposition that "the Bill of Rights protects foreign nationals residing abroad from *actions taken abroad* by the officials" (*ibid.* (emphasis in the original)). Finally, Judge Wallace found "very troubling" the majority's insistence on a warrant to conduct the searches (*id.* at 77a). In addition to other "constitutional and pragmatic" difficulties, he observed, "the majority's ruling ignores the

[6] The court of appeals also rejected the government's contention that a suppression remedy was unwarranted because the agents had relied in good faith on assurances by the Mexican officials that the search was lawful. Pet. App. 32a-33a.

practical realities that when our agents conduct searches abroad, they are at the mercy of foreign officials. The foreign officials are the ones who decide the scope and reasonableness of any proposed search, whether the search will occur at all, and under what conditions it will be conducted. Even if, in a given case, these foreign officials defer considerably to the requests of our own agents, the fact remains that our agents are conducting the search at the pleasure and under the terms imposed by our foreign hosts." *Id.* at 79a.[7]

INTRODUCTION AND SUMMARY OF ARGUMENT

In conducting the search of respondent's Mexicali residence, the DEA agents followed every requirement imposed by their Mexican hosts. They secured the advance authorization of responsible Mexican officials. They enlisted the active participation of the Mexican police. And they obeyed the orders of the supervising Mexican official in executing the search and in securing the seized items. The court of appeals suppressed the seized evidence, however, because the agents did not take the additional precaution of obtaining an American search warrant—a warrant which no American official is empowered to issue, and which, as the court of appeals acknowledged, "would be a dead letter in Mexico" (Pet. App. 35a-36a).

The court of appeals' decision is both unprecedented and unwise. Its application of the Fourth Amendment, and the Warrant Clause in particular, cannot be squared with this Court's decisions. The decision also threatens to

[7] Judge Wallace also found no basis for suppressing the evidence either on the ground that the Mexicali search violated due process, or because suppression was appropriate under the district court's "inherent power" to ensure compliance with the Fourth Amendment. Pet. App. 65a-79a.

impair law enforcement efforts overseas—efforts that cannot be effectively pursued if they must depend upon a magistrate's case-by-case authorization.

A. We do not believe that the Fourth Amendment protected respondent against the search of his Mexicali residence. As Justice Harlan explained in his concurring opinion in *Reid* v. *Covert,* 354 U.S. 1, 75 (1957), the question whether, and to what extent, the Constitution applies overseas "is one of judgment, not of compulsion." In making such judgments, courts must consider the nature of the underlying right, the territory in which the claim arises, and the relationship of the claimant to the American community. Applying Justice Harlan's analysis, we conclude that respondent, a foreign national, enjoyed no Fourth Amendment protection against the search of his overseas residence.

B. Even if the Fourth Amendment applies, the court of appeals erred in requiring the agents to comply with the Warrant Clause. This Court has made clear that a search warrant is not required by the Fourth Amendment where "the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search," *Camara* v. *Municipal Court,* 387 U.S. 523, 533 (1967), or where, in light of the nature of the search, a warrant would do little to further the purposes of the Warrant Clause, *Skinner* v. *Railway Labor Executives' Ass'n,* 109 S. Ct. 1402, 1415 (1989). For several reasons, an overseas search—which must be conducted, if at all, with the permission and under the supervision of foreign officials—falls within both exceptions. An overseas search should be governed not by the warrant requirement that was imposed by the court below but, at most, by the more basic and flexible Fourth Amendment requirement of reasonableness. Under that standard, the search of respondent's Mexicali residence was entirely lawful.

C. The court of appeals' application of the Fourth Amendment in this setting, and its application of the Warrant Clause in particular, significantly threaten American law enforcement and intelligence gathering activities abroad. Criminal activity has become an increasingly international enterprise, and American law enforcement has therefore assumed an increasingly international presence. In that capacity, United States officers, in conjunction with their foreign counterparts, frequently participate in physical searches and seizures and assist in electronic surveillance. The imposition of a warrant requirement in that context is severely impracticable, threatening not only our law enforcement efforts, but also our ongoing relations with our hosts.

ARGUMENT

UNITED STATES LAW ENFORCEMENT OFFICERS ARE NOT REQUIRED TO SECURE A WARRANT BEFORE THEY MAY SEARCH THE OVERSEAS RESIDENCE OF A FOREIGN NATIONAL

A. The Fourth Amendment Does Not Govern The Extraterritorial Search Of A Foreign National's Property

The court of appeals rested its decision on a simple, beguiling syllogism. It began with the premise, drawn from this Court's decision in *Reid* v. *Covert,* 354 U.S. 1 (1957), that " '[t]he United States is entirely a creature of the Constitution' " and " 'can only act in accordance with all the limitations imposed by the Constitution' " (Pet. App. 7a (citation omitted)). From that premise, the court continued, "a proposition of enormous vitality may be drawn: The Constitution imposes substantive constraints on the federal government, even when it operates abroad" (*id.* at

8a). With the first two propositions in mind, the court proceeded easily to its conclusion—that respondent, a foreign national, must be granted the full protections of the Fourth Amendment against the search and seizure of his Mexicali residence.

We accept the court's premises but not its conclusion. While the Constitution no doubt imposes some "substantive constraints on the federal government, even when it operates abroad" (Pet. App. 8a), it does not apply in full measure to every corner of the globe (regardless of the territorial connection to the United States), and it does not protect all persons (regardless of their connection to the United States).

This Court has stated that, as a general matter, "[n]either the Constitution nor the laws passed in pursuance of it have any force in foreign territory unless in respect of our own citizens." *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936). See also *United States* v. *Belmont*, 301 U.S. 324, 332 (1937); *United States* v. *Pink*, 315 U.S. 203, 226 (1942). That formulation is an accurate, shorthand description of the results reached by this Court in cases involving the extraterritorial application of constitutional protections.[8] Yet the decision whether to give extraterritorial application to particular constitutional provisions in particular contexts is not one that admits of categorical answers. Instead, it requires a careful assessment of several factors, including

[8] The statement in *Curtiss-Wright* is not entirely accurate to the extent that it suggests that federal statutes are inapplicable to the activities of foreign citizens beyond this country's borders. Some statutes have been given extraterritorial effect even with regard to noncitizens. See, *e.g.*, *United States* v. *Alomia-Riascos*, 825 F.2d 769, 771 (4th Cir. 1987), cert. denied, 108 S. Ct. 715 (1988) (21 U.S.C. 955a(c) applies to foreign nationals with respect to narcotics activities on the high seas); *United States* v. *Benitez*, 741 F.2d 1312, 1316-1317 (11th Cir. 1984), cert. denied, 471 U.S. 1137 (1985) (18 U.S.C. 1114 and 1117, proscribing, respectively, the murder and conspiracy to murder certain public officials, and 18 U.S.C. 111, proscribing assaults on certain public officials, apply to foreign nationals with respect to overseas activity); *Chua Han Mow* v. *United States*, 730 F.2d 1308, 1311-1312 (9th Cir. 1984), cert. denied, 470 U.S. 1031 (1985) (21 U.S.C. 959 and 963 apply to foreign nationals with respect to narcotics activities overseas); *United States* v. *Yunis*, 681 F. Supp. 896 (D.D.C. 1988) (18 U.S.C. 1203, proscribing the taking hostage of American nationals, and 18 U.S.C. 32(a), proscribing the willful destruction of an aircraft, apply to a foreign national charged with hijacking a civilian aircraft in the Middle East).

the nature of the underlying right, the character of the territory in which the constitutional claim arose, and the relationship of the claimant to the United States. That is the approach to questions of extraterritoriality articulated by Justice Harlan in his concurring opinion in *Reid* v. *Covert*, 354 U.S. 1 (1957). That approach is also faithful to the analysis the Court has employed, and the results the Court has reached, in cases involving the extraterritorial application of constitutional guarantees. We urge that approach here. Under it, we submit that respondent, a foreign national, may not challenge the search of his overseas residence on Fourth Amendment grounds.

1. Whether a constitutional right applies overseas depends on the nature of the right and the context in which it is asserted

a. The court of appeals concluded that the Constitution applies wherever and whenever the United States acts abroad. That expansive view of the Constitution cannot be squared with this Court's decisions. Indeed, for much of this Nation's history, the common understanding was that the Constitution had no extraterritorial force at all. As Justice Johnson explained in his opinion at circuit in

American Insurance Co. v. *Canter,* 26 U.S. (1 Pet.) 511 (1828), "[a]t the time the Constitution was formed, the limits of the territory over which it was to operate were generally defined and recognised. These limits consisted in part, of organized states, and in part of territories, the absolute property and dependencies of the United States. These states, this territory, and future states to be admitted into the Union, are the sole objects of the Constitution" (*id.* at 517).

The Court's view of the matter had not changed by the end of the 19th century. In 1883, the Court characterized it as "an axiom of international jurisprudence" that "the laws of a country have no extra-territorial force." *Canadian Southern Ry.* v. *Gebhard,* 109 U.S. 527, 536. And in 1895, the Court stated, without qualification, that "[n]o law has any effect, of its own force, beyond the limits of the sovereignty from which its authority is derived." *Hilton* v. *Guyot,* 159 U.S. 113, 163 (1895).

Indeed, in *In re Ross,* 140 U.S. 453 (1891), this Court held that not even American citizens enjoy constitutional protection outside the confines of the United States. The petitioner in the *Ross* case, an American seaman stationed in Yokohama harbor, was convicted of murder and sentenced to death, although his sentence was later commuted to life imprisonment by President Hayes (see *id.* at 454-455). Nearly ten years later, the petitioner brought a habeas corpus action, contending that his trial before the American consular tribunal in Japan violated his constitutional rights to an indictment by a grand jury and to a trial by a petit jury. This Court unanimously rejected the claim that "the same protection[s] and guarantee[s] * * * secured

by the Constitution to citizens of the United States at home, should be enjoyed by them abroad." *Id.* at 463. "By the Constitution a government is ordained and established 'for the United States of America,' " the Court explained, *id.* at 464, "and not for countries outside of their limits." Accordingly, the Court concluded, the Constitution "can have no operation in another country." *Ibid.* Moreover, the Court noted, petitioner's claim—that the protections of the Constitution extend to all Americans abroad—ignored the constraints that necessarily apply whenever the United States acts within the territory of a separate sovereign. As the Court put it, "[w]hen * * * the representatives or officers of our government are permitted to exercise authority of any kind in another country, it must be on such conditions as the two countries may agree, the laws of neither one being obligatory upon the other." *Ibid.* The Court therefore looked to the treaties between the United States and Japan and concluded that, under the governing provisions, petitioner had received a fair trial. *Id.* at 465-470.[9]

Although a plurality of this Court in *Reid* v. *Covert,* 354 U.S. 1 (1957), rejected the strict territorial limitations articulated in *Ross* (see 354 U.S. at 12), the Court has consistently rejected the proposition—endorsed by the court below—that all of the protections of the Constitution apply wherever, whenever, and against whomever the United States acts abroad. Thus, the Court has explained that "[i]n the case of the territories, as in every other instance, when a provision of the Constitution is invoked, the ques-

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[9] Cf. *United States* v. *Dawson,* 56 U.S. (15 How.) 467, 487-488 (1854) (Sixth Amendment does not apply in trials of offenses committed in Indian country).

tion which arises is, not whether the Constitution is operative, * * * but whether the provision relied on is applicable." *Downes* v. *Bidwell,* 182 U.S. 244, 292 (1901). As the Court later put the same point, "[t]he Constitution * * * contains grants of power and limitations which in the nature of things are not always and everywhere applicable, and the real issue [is] * * * which of its provisions were applicable by way of limitation upon the exercise of executive and legislative power in dealing with new conditions and requirements." *Balzac* v. *Porto Rico,* 258 U.S. 298, 312 (1922).

The *Reid* case, on which the court of appeals prominently relied (Pet. App. 7a-9a, 15a), does not support a more expansive extraterritorial view of the Constitution. There, the Court held that an American living overseas was entitled to a civil jury trial, rather than a trial by court-martial, in a prosecution for the murder of her husband, a military officer. A plurality of the Court "reject[ed] the idea that when the United States acts against *citizens* abroad it can do so free of the Bill of Rights." 354 U.S. at 5 (emphasis added). The plurality explained that "[w]hen the Government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land." *Id.* at 6. As the plurality put it, "[t]he mere fact that [the defendant] had gone overseas with [her] husband[ ] should not reduce the protection the Constitution gives [her]." *Id.* at 33.

By its terms, *Reid* is limited to governmental action against American citizens overseas. Nor is it altogether clear that *Reid* applies to every constitutional provision, regardless of its nature or the ease with which it can be accommodated to a foreign setting. See *Haig* v. *Agee,* 453 U.S. 280, 308 (1981) (stating that the Court would assume,

"*arguendo,* that First Amendment protections reach beyond our national boundaries"). As a technical matter, moreover, *Reid* was not an "extraterritorial" case at all. Mrs. Covert's claim arose during the exercise of court-martial jurisdiction on an Air Force base in England, which was "a manifestation of the 'sovereign power' of this nation," rather than an act "in derogation [of] the superior authority of a host country." Stephan, *Constitutional Limits on International Rendition of Criminal Suspects,* 20 Va. J. Int'l L. 777, 790 (1980). In any event, *Reid* does not stand for the "proposition of enormous vitality" derived by the court of appeals—that the Constitution binds the government wherever, and against whomever, it acts.[10] Indeed, Justice Black, who authored the plurality opinion, had previously rejected the proposition "that this nation either must or should attempt to apply every constitutional provision of the Bill of Rights in controlling temporarily occupied countries." *Johnson* v. *Eisentrager,* 339 U.S. 763, 796-797 (1950) (Black, J., dissenting).[11]

b. We therefore reject the court of appeals' categorical approach to questions of extraterritoriality under the Constitution. The Constitution does *not* apply across the board, to every person and in every setting overseas. Rather, as Justice Harlan explained in his concurring opinion in *Reid,* the question whether to apply a particular

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[10] Accord Stephan, *supra,* 20 Va. J. Int'l L. at 782 ("Nothing in [*Reid*] can be taken as altering the long held understanding that, in general, foreign nationals abroad are neither parties to nor beneficiaries of the agreement between the federal government and its people embodied in the Constitution"); Note, *The Extraterritorial Applicability of the Fourth Amendment,* 102 Harv. L. Rev. 1672, 1676 n.21 (1989).

[11] See Stephan, *Constitutional Limits on the Struggle Against International Terrorism: Revisiting the Rights of Overseas Aliens,* 19 Conn. L. Rev. 831, 838 & n.28 (1987).

constitutional provision abroad is "one of judgment, not of compulsion." 354 U.S. at 75 (Harlan, J., concurring). The Court's prior cases, Justice Harlan observed, "stand for an important proposition * * * not that the Constitution 'does not apply' overseas, but that there are provisions in the Constitution which do not *necessarily* apply in all circumstances in every foreign place." *Id.* at 74 (emphasis in original). The question, he concluded, "is *which* guarantees of the Constitution *should* apply in view of the particular circumstances, the practical necessities, and the possible alternatives." *Id.* at 75 (emphasis in original).

In making the kinds of case-by-case judgments suggested by Justice Harlan, the Court has considered three general factors: (1) "the relation of the particular territory to the United States" (*Dorr* v. *United States,* 195 U.S. 138, 142 (1904)), *i.e.,* whether the asserted constitutional claim arose in a territory in which the United States exercises significant sovereignty; (2) the nature of the underlying right, *i.e.,* whether the right can readily be applied in the foreign setting, or whether its application in that setting would be "impractical and anomalous" (*Reid,* 354 U.S. at 75 (Harlan, J., concurring)); and (3) the relationship of the claimant to the United States, *i.e.,* whether the claimant has some basis for asserting ongoing membership in the American community (see *Johnson* v. *Eisentrager,* 339 U.S. 763, 770 (1950)).

First among those factors is the relationship between the United States and the place in which the constitutional claim arose. The *Insular Cases*—involving constitutional claims relating to territories obtained by the United States either by purchase or conquest—illustrate that inquiry.[12]

[12] See, *e.g., Balzac* v. *Porto Rico,* 258 U.S. 298 (1922) (jury trial provision inapplicable in Puerto Rico); *Ocampo* v. *United States,* 234 U.S. 91 (1914) (grand jury provision inapplicable in Philippines);

In those cases, the Court distinguished between "incorporated" and "unincorporated" territories, and it conferred different degrees of constitutional protection upon each of them. "Incorporated territories" were "those Territories destined for statehood from the time of acquisition, and the Constitution was applied to them with full force. *Examining Board of Engineers, Architects & Surveyors* v. *Flores del Otero,* 426 U.S. 572, 599 n.30 (1976). By contrast, "unincorporated territories" were those territories "not possessing that anticipation of statehood"; and even though the United States exercised substantial sovereignty in those territories, the Court held that "only 'fundamental' constitutional rights were guaranteed to the inhabitants." *Ibid.*

For example, in *Downes* v. *Bidwell, supra,* the Court held that Article I, Sec. 8 of the Constitution, which provides that "all Duties, Imposts and Excises shall be uniform throughout the United States," was not applicable to Puerto Rico.[13] In a concurring opinion that later became the governing doctrine in the area (see *Torres* v. *Puerto Rico,* 442 U.S. 465, 469 (1979); *Examining Board,* 426 U.S. at 599-600 n.30), Justice White explained that in determining whether to apply a particular constitutional

Rassmussen v. *United States,* 197 U.S. 516 (1905) (jury trial provision applicable in Alaska); *Dorr* v. *United States,* 195 U.S. 138 (1904) (jury trial provision inapplicable in Philippines); *Hawaii* v. *Mankichi,* 190 U.S. 197 (1903) (grand and petit jury requirements inapplicable in Hawaii); *Downes* v. *Bidwell,* 182 U.S. 244 (1901) (revenue clauses of Constitution inapplicable to Puerto Rico). See generally Coudert, *The Evolution of the Doctrine of Territorial Incorporation,* 26 Colum. L. Rev. 823 (1926); Langdell, *The Status of Our New Territtories,* 12 Harv. L. Rev. 365 (1899); Thayer, *Our New Possessions,* 12 Harv. L. Rev. 464 (1899).

[13] See generally Helfeld, *How Much of the United States Constitution and Statutes are Applicable to the Commonwealth of Puerto Rico,* 110 F.R.D. 452 (1986).

provision abroad, "the *status* of a particular territory" (182 U.S. at 294 (emphasis in the original)) must generally be considered. Because Puerto Rico "had not been incorporated into the United States, but was merely appurtenant thereto as a possession" (*id.* at 341-342), Justice White concluded that the Uniform Duties Clause did not apply there.

If Puerto Rico—a territory in which the United States is sovereign—is governed only by "fundamental" constitutional provisions, there is even less basis for applying the Constitution in a country in which the United States exercises no sovereignty at all. Independent sovereigns "lie[ ] outside the structure of the Union." *Monaco* v. *Mississippi*, 292 U.S. 313, 330 (1934). Thus, when the United States acts in a territory controlled by a separate sovereign, it does so only "on such conditions as the two countries may agree." *In re Ross*, 140 U.S. at 464.[14] The essence of sovereignty is the power to set the governing rules of law, "generally to the exclusion of other states." 1 Restatement (Third) of The Foreign Relations Law of the United States, § 206 comment b, at 94 (1987). It follows that the Constitution should be presumptively inapplicable in places in which other nations, and not the United States, are sovereign.

Second, the Court has carefully considered the *nature* of the constitutional right asserted and the extent to which it can sensibly be applied in a foreign setting. In *Balzac* v. *Porto Rico*, *supra*, for example, the Court held that the right to a trial by jury under the Sixth Amendment does

[14] Cf. *Neely* v. *Henkel*, 180 U.S. 109, 122-123 (1901) (Constitution does not protect American citizen who violates the criminal law of a foreign country); *Fleming* v. *Page*, 50 U.S. (9 How.) 602, 616 (1850) ("every place which was out of the limits of the United States, as previously established by the political authorities of the government, was still foreign; nor did our laws extend over it").

not extend to Puerto Rico. In reaching that conclusion, the Court observed that political and cultural differences between the United States and overseas territories may preclude the extraterritorial application of the Constitution. "The jury system," for example, "needs citizens trained to the exercise of the responsibilities of jurors" and "[i]n common law countries centuries of tradition have prepared a conception of the impartial attitude jurors must assume" (258 U.S. at 310). Conversely, "Congress has thought that a people like the * * * Porto Ricans, trained to a complete judicial system which knows no juries, living in compact customs and political conceptions, should be permitted themselves to determine how far they wish to adopt this institution of Anglo-Saxon origin, and when" (*ibid.*).

When the Court has applied a particular constitutional provision overseas, it has done so not because the Constitution always governs United States activities abroad, but because the provision in question could be extended without compromising American national interests or disrupting local traditions. In *Torres* v. *Puerto Rico*, 442 U.S. 465 (1979), for example, the Court held that the Fourth Amendment's restrictions on searches and seizures apply to Puerto Rico. The Court relied on "Congress' implicit determinations * * * and long experience [which] establish that the Fourth Amendment's restrictions on searches and seizures may be applied to Puerto Rico without danger to national interests or risk of unfairness." *Id.* at 470. See also *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663, 668-669 n.5 (1974).

Third, the Court has considered the extent to which the claimant maintains ongoing membership in the American community—whether by citizenship, naturalization, or continuous presence. The Court's decision in *Johnson* v. *Eisentrager*, 339 U.S. 763 (1950), illustrates that con-

sideration. The plaintiffs in the *Johnson* case, German nationals who had been convicted by an American military commission and imprisoned overseas for engaging in military activity against the United States, brought a habeas corpus action in a United States federal court, alleging that they had been denied various rights arising under the United States Constitution. The court of appeals held in plaintiffs' favor, reasoning, like the court of appeals in the present case, that "any person, including an enemy alien, deprived of his liberty anywhere under any purported authority of the United States is entitled to the writ if he can show that extension to his case of any constitutional rights or limitations would show his imprisonment illegal." *Id.* at 767. This Court reversed, expressly rejecting the proposition that constitutional rights extend to all "persons," regardless of their connection to this country. "Such extraterritorial application of organic law," the Court explained (*id.* at 784-785), "would have been so significant an innovation in the practice of governments that, if intended or apprehended, it could scarcely have failed to excite contemporary comment. Not one word can be cited. No decision of this Court supports such a view. * * * None of the learned commentators on our Constitution has even hinted at it. The practice of every modern government is opposed to it."

This third factor—whether the claimant has a close connection to the American community—reflects the broader principle that the Constitution represents "a 'compact' or 'social contract' among the people of the United States" (Pet. App. 39a). Accord *Chisholm* v. *Georgia,* 2 U.S. (2 Dall.) 419, 471 (1793) (emphasis in the original) ("the Constitution of the *United States* is * * * a compact made by the people of the *United States* to govern themselves as to general objects, in a certain manner"); *The Federalist* No. 39 (J. Madison). Persons, whether citizens or not, who

have made the commitment of ongoing residence in the United States necessarily assume the duties that membership in the American community entails. "As a foreigner domiciled in the country," an alien "owe[s] allegiance to the government of the country so long as he reside[s] within its limits * * *." *Radich* v. *Hutchins,* 95 U.S. 210, 211 (1877). Accord *Carlisle* v. *United States,* 83 U.S. (16 Wall.) 147, 154 (1873). With those assumed duties, however, come corresponding protections. As the court below acknowledged, "[b]y accepting the obligations of allegiance to the United States, the alien receives in exchange some measure of constitutional protection" (Pet. App. 17a). For that reason, as the Court stated in *Johnson,* "[t]he alien * * * has been accorded a generous and ascending scale of rights as he increases his identity with our society." 339 U.S. at 770. "Mere lawful presence in the country creates an implied assurance of safe conduct and gives him certain rights; they become more extensive and secure when he makes preliminary declaration of intention to become a citizen, and they expand to those of full citizenship upon naturalization." *Ibid.*; accord *Landon* v. *Plasencia,* 459 U.S. 21, 32 (1982).

2. Under those principles, the Fourth Amendment does not extend to the extraterritorial search of a foreign national's property

Because the court of appeals assumed that every provision of the Constitution extends abroad whenever the United States asserts its authority, the court did not examine the nature of the right at issue—the right against unreasonable searches and seizures—or the context in which it has been asserted in this case. In our view, the text and purposes of the Fourth Amendment suggest that the underlying right has little, if any, extraterritorial force, particularly when urged on behalf of a foreign national.

In light of the factors discussed above, we believe that respondent enjoyed no Fourth Amendment protection against the search of his Mexicali residence.[15]

a. The text of the Fourth Amendment strongly suggests that its protections do not extend to foreign nationals with respect to overseas searches. The Amendment provides in pertinent part that "[t]he right of *the people* to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. Const. Amend. IV (emphasis added). Unlike the Fifth Amendment, which protects all "persons," or the Sixth Amendment, which protects all those who are "accused," Fourth Amendment rights are limited to "the people"—a term that does not easily encompass persons living beyond our shores. As Judge Wallace explained in dissent, "it appears that 'the people' referred to in the amendment are 'The People' in the Preamble who endowed the federal government with certain limited, enumerated powers" (Pet. App. 39a); and, consistent with the Preamble, Fourth Amendment protection would seem to extend only to those persons who "may properly be considered one of *the people of the United States*" (*ibid.* (emphasis in the original)).[16] Additional "[s]upport for such a meaning may be found in the provisions of article I concerning election of representatives by 'the People,' * * * and in the ninth and tenth amendments, by which 'the people' retain and reserve rights not enumerated in the Constitution and powers not delegated to the United States." Damrosch, *Foreign States and the Constitution,* 73 Va. L. Rev. 483, 488 n.13 (1987). And construing parallel language in the First Amendment, this Court has held that an alien who has not been permitted to enter this country cannot assert free speech or free press claims, since he is not "one of the people to whom these

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[15] There is no question that respondent seeks an *extraterritorial* application of the Fourth Amendment in this case. Simply because respondent was present in the United States at the time of the search, and is present now when the government seeks to offer the tally sheets into evidence, does not change the fact that the alleged violation of the Fourth Amendment occurred overseas. See *United States* v. *Leon,* 468 U.S. 897, 906 (1984) (Fourth Amendment violation fully accomplished at time of unlawful search or seizure); *United States* v. *Janis,* 428 U.S. 433, 443 (1976) ("the issue of admissibility of evidence * * * is determined after, and apart from, the violation"); *United States* v. *Calandra,* 414 U.S. 338, 354 (1974). Thus, we need not dispute the proposition, relied on by the court of appeals (Pet. App. 20a-22a), that a foreign national enjoys Fourth Amendment rights with respect to searches and seizures conducted in this country. See *INS* v. *Lopez-Mendoza,* 468 U.S. 1032, 1050 (1984); see also *id.* at 1051 (Brennan, J., dissenting); *Almeida-Sanchez* v. *United States,* 413 U.S. 266 (1973); *Abel* v. *United States,* 362 U.S. 217 (1960). Unlike in those cases, respondent's claim requires this Court to apply the Fourth Amendment to conduct by United States officials that took place overseas.

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[16] The Preamble also states (emphasis added) that "the People of the United States * * * ordain and establish this Constitution" in part to "secure the Blessings of Liberty *to ourselves and our Posterity.*" As Professor Langdell explained in 1899 (*The Status of Our New Territories,* 12 Harv. L. Rev. 365, 372-373):

> [T]here is a very strong presumption that when a constitution is made by a sovereign people, it is made exclusively for the country inhabited by that people, and exclusively for that people regarded as a body politic, and so having perpetual succession * * *. The preamble, however, does not leave it to presumption to determine for what regions of country and for what people the Constitution of the United States was made; for it expressly declares that its purposes and objects are, first, to form a more perfect union (*i.e.*, among the thirteen States, or as many of them as shall adopt it). Then follow four other objects which, though in terms indefinite as to their territorial scope, are by clear implication limited to the same States; and lastly its purposes and object are declared to be to secure the blessings of liberty to the people by whom it is ordained and established, and their successors * * *.

things are secured by our Constitution" (*United States ex rel. Turner* v. *Williams,* 194 U.S. 279, 292 (1904)).[17]

b. A broad extraterritorial application of the Fourth Amendment is also difficult to square with the nature of the protections afforded by the Amendment—"expectation[s] of privacy that society is prepared to consider reasonable." *United States* v. *Jacobsen,* 466 U.S. 109, 122 (1984); see also *Katz* v. *United States,* 389 U.S. 347, 360-362 (1967) (Harlan, J., concurring). By their nature, "reasonable expectations of privacy" are not free-floating concepts, capable of universal application. To the contrary, because "expectations of privacy by law must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society" (*Rakas* v. *Illinois,* 439 U.S. 128, 143-144 n.12 (1978)), the interests that are conventionally protected by the Fourth Amendment will vary from culture to culture, and from one society to another.[18] It is, moreover, "ob-

[17] Former Attorney General Levi, in testimony before Congress, summarized the point (5 *Intelligence Activities: The National Security Agency and Fourth Amendment Rights: Hearings on S. Res. 21 Before the Senate Select Comm. to Study Governmental Operations With Respect to Intelligence Activities,* 94th Cong., 1st Sess. 66, 74 (1975)):

> Who are "the people" to whom the Amendment refers? The Constitution begins with the phrase, "We the People of the United States." That phrase has the character of words of art, denoting the power from which the Constitution comes. It does suggest a special concern for the American citizen and for those who share the responsibilities of citizens. The Fourth Amendment guards the right of "the people" and it can be urged that it was not meant to apply to foreign nations, their agents and collaborators. Its application may at least take account of that difference.

[18] See, *e.g., Tennessee* v. *Garner,* 471 U.S. 1, 15-16 (1985) ("look[ing] to prevailing rules in individual jurisdictions" in assessing the reasonableness of police procedures); *California* v. *Greenwood,* 108 S. Ct. 1625, 1631 (1988) (concluding that "American society as a whole possesses" no reasonable expectation of privacy in trash left for collection).

vious that the political system in each society will be a fundamental force in shaping its balance of privacy, since certain patterns of privacy, disclosure, and surveillance are functional necessities for particular kinds of political regime." A. Westin, *Privacy and Freedom* 23 (1967). As a result, there is no reason to believe that the American privacy values protected by the Fourth Amendment resemble the privacy values enjoyed by foreign nationals abroad.[19] To the contrary, as one commentator has noted, "American patterns of privacy are, in the main, the end products of a long period of cultural development" and "it is very clear that our view of privacy as a set of rules against intrusion and surveillance focused on the household occupied by a nuclear family is a conception which is not to be found universally in all societies." J. Roberts & T. Gregor, *Privacy: A Cultural View, reprinted in Privacy* 199, 224-225 (J. Pennock & J. Chapman ed. 1971); see generally B. Moore, Jr., *Privacy: Studies in Social and Cultural History* (1984).

To accommodate the Fourth Amendment to a foreign setting, courts would therefore be required to assess the

[19] The differences between the Fourth Amendment Warrant Clause and the comparable provision in the Mexican Constitution of 1917, art. 16, illustrate the point. For example, although Article 16 seems to require the police to establish probable cause before they may obtain an *arrest* warrant, there is no indication in that provision that probable cause is required in order to secure a *search* warrant. Moreover, Article 16 contains an explicit exception from the Warrant Clause for "administrative" searches designed to "ascertain[ ] whether the sanitary and police regulations have been complied with * * *." See also Murray, *Criminal Procedure in the Federal District and Federal Territories of Mexico,* 19 Miami L. Rev. 251, 253 (1964-1965).

complex of rules, customs, and practices that give rise to reasonable expectations of privacy overseas.[20] That is a task that courts in this country are ill-suited to perform. See generally Stephan, *Constitutional Limits on International Rendition of Criminal Suspects,* 20 Va. J. Int'l L. 777, 788 (1980) ("Where the rights of citizens abroad are involved, courts at least possess a frame of reference in the form of rights enjoyed by a citizen domestically. The rights enjoyed by an overseas alien against his government, by contrast, vary dramatically throughout the world"). Still less can American courts "balance the nature and quality of the intrusion on [a foreign] individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion"—which is the means of assessing the reasonableness of the search or seizure at issue (*United States* v. *Place,* 462 U.S. 696, 703 (1983)). The impracticability of any such inquiry powerfully suggests that the Fourth Amendment was not designed to protect foreign nationals against searches and seizures abroad.

Quite apart from its impracticability, judicial inquiry into expectations of privacy abroad may cause considerable embarrassment to the foreign State and thereby hinder the executive branch ... its conduct of foreign relations. Cf. *Banco Nacional de Cuba* v. *Sabbatino,* 376 U.S. 398, 430-432 (1964). Whether, and to what extent, a foreign sovereign protects the privacy of its citizens is doubtless a matter of some delicacy. It ought not be the subject of adversarial litigation in an American courtroom, particu-

[20] As one commentator has recently put it, "[n]otions of privacy central to American society may be utterly alien to other societies. To judge the legitimacy of expectations of privacy in a foreign country, therefore, American courts must refer to the understandings prevailing in that country." Note, *The Extraterritorial Applicability of the Fourth Amendment,* 102 Harv. L. Rev. 1672, 1687 (1989).

larly since such litigation "implicitly passes judgment on the legal system of the foreign country and thereby threatens comity values." Note, *supra,* 102 Harv. L. Rev. at 1688; see generally Note, *Constitutional Problems in the Execution of Foreign Penal Sentences: The Mexican-American Prisoner Transfer Treaty,* 90 Harv. L. Rev. 1500, 1518-1522 (1977). What is more, a judgment by an American court that an overseas search is unreasonable—and that the evidence obtained must therefore be suppressed—frustrates the decision of the foreign sovereign to authorize and participate in the search, and thereby undermines the Executive's ability to enlist foreign cooperation in the future. As one commentator has recently observed, "[a] foreign country cooperating with United States law enforcement efforts may refuse future cooperation if the fruits of these efforts ultimately prove useless." Note, *supra,* 102 Harv. L. Rev. at 1688.[21]

c. In short, the Fourth Amendment by its nature cannot readily be applied beyond the territorial limits of the United States. In the context of this case, moreover, extraterritorial protections are particularly unwarranted. Mexi-

[21] Ordinarily, when the United States exercises its law enforcement authority overseas, it does so in cooperation with the host country. For that reason, comity interests counsel against the application of the Fourth Amendment abroad. The United States, however, may occasionally be obliged to conduct unilateral law enforcement efforts in an uncooperative country, for example to apprehend a terrorist. The Fourth Amendment is equally inappropriate in that context. As Professor Stephan has noted, "[j]udicial barriers would impede and perhaps inhibit these efforts. Especially where the government acts in a country that is hostile to its endeavors, irregular conduct may be the only way of protecting U.S. interests. The judiciary should not take it upon itself to rule out such action in all cases." Stephan, *Constitutional Limits on International Rendition of Criminal Suspects,* 20 Va. J. Int'l L. 777, 784 (1980).

co, of course, is a separate sovereign, with its own traditions and institutions. Respondent is a foreign national, with no ties to the American community other than his presence in this country for trial. These factors, taken in combination, afford respondent no Fourth Amendment protection against the search of his overseas premises.

Of course, to hold that the Fourth Amendment does not apply to overseas searches of the property of a foreign national is not to suggest that there are or should be no controls whatever over the investigative activities of American agents overseas. Besides the obligations imposed by the host countries themselves, Congress can restrict American agents' overseas activities as it sees fit.[22] And the Due Process Clause can be invoked to bar the admission of evidence in American courts where that evidence was obtained by a method that "shocks the conscience" or fails to "respect certain decencies of civilized conduct." *Rochin* v. *California*, 342 U.S. 165, 172, 173 (1952). Deciding that the Fourth Amendment is inapplicable in the present context would therefore not condone, or abandon control over, serious misconduct by American officers abroad. It would simply recognize that the balance between privacy and law enforcement interests that the Fourth Amendment strikes for this country cannot easily be exported.

[22] Indeed, Congress has done so in the narcotics area, albeit only with respect to "direct police arrest action[s] in a foreign country" and "interrogation[s] of any United States person arrested in any foreign country" (22 U.S.C. 2291(c)). Congress's failure to restrict the overseas activities of narcotics agents more extensively suggests that it did not find it necessary or desirable to impose the kinds of constraints required by the court of appeals.

B. Even If The Fourth Amendment Applies, It Does Not Require United States Officers To Secure A Warrant To Search An Overseas Residence

Once the court of appeals determined that the Fourth Amendment applied extraterritorially, it unflinchingly applied the Warrant Clause as well. To relieve the government of the warrant requirement, the court reasoned, "would be to treat foreign searches differently from domestic searches just because they are foreign" (Pet. App. 35a). Although it acknowledged that an American warrant "would be of no legal validity in Mexico," the court concluded that a warrant would still "have substantial constitutional value in this country" because it would "reflect the magistrate's determination that probable cause to search existed" and would "define the scope of the search" (*id.* at 36a). Because the agents had not secured an American search warrant, the court upheld the suppression of evidence from respondent's Mexicali residence.

We disagree. In the context of overseas searches and seizures, " 'special needs, beyond the normal need for law enforcement, make the warrant * * * requirement impracticable.' " *Griffin* v. *Wisconsin*, 107 S. Ct. 3164, 3167 (1987) (citation omitted). If the Fourth Amendment applies at all in this setting, all it requires is reasonableness. In making that judgment, moreover, courts must afford substantial deference to the requirements imposed by the host country.

1. "The fundamental command of the Fourth Amendment is that searches and seizures be reasonable * * *." *New Jersey* v. *T.L.O.*, 469 U.S. 325, 340 (1985). See *United States* v. *Montoya de Hernandez*, 473 U.S. 531, 537 (1985); *United States* v. *Villamonte-Marquez*, 462 U.S. 579, 588 (1983). Thus, "the Fourth Amendment does not proscribe all searches and seizures, but only those that

are unreasonable." *Skinner* v. *Railway Labor Executives' Ass'n,* 109 S. Ct. 1402, 1414 (1989). See *Carroll* v. *United States,* 267 U.S. 132, 147 (1925). The test of reasonableness, moreover, "is not capable of precise definition or mechanical application." *Bell* v. *Wolfish,* 441 U.S. 520, 559 (1979). See *Graham* v. *Connor,* No. 87-6571 (May 15, 1989), slip op. 9. Rather, in defining the contours of the right to be free from unreasonable searches and seizures, this Court has repeatedly said that " 'the specific content and incidents of this right must be shaped by the context in which it is asserted.' " *Wyman* v. *James,* 400 U.S. 309, 318 (1971) (quoting *Terry* v. *Ohio,* 392 U.S. 1, 9 (1968)).

In the context of an ordinary criminal investigation, the Court has held that both probable cause and a warrant are generally necessary to render a search reasonable. See *United States* v. *Karo,* 468 U.S. 705, 717 (1984); *United States* v. *United States District Court,* 407 U.S. 297, 317 (1972). But as the Court explained recently in *Skinner* v. *Railway Labor Executives' Ass'n,* 109 S. Ct. 1402, 1414 (1989) (citation omitted), exceptions from those requirements have been permitted "when 'special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.' "

Where, for example, "the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search" (*Camara* v. *Municipal Court,* 387 U.S. 523, 533 (1967)), the Court has routinely held that a warrant is not required by the Fourth Amendment. In *Griffin* v. *Wisconsin,* 107 S. Ct. 3164 (1987), the Court held that a probation officer need not obtain a warrant before conducting a search of a probationer's residence. The Court explained that "[a] warrant requirement would interfere to an appreciable degree with the probation system, setting up a magistrate rather than the probation officer as the judge of how close a supervision the probationer requires" (107 S. Ct. at 3169). Similarly, in *New Jersey* v. *T.L.O.* the Court held that school officials did not need a warrant or probable cause to search a child suspected of an infraction of school disciplinary rules, because a warrant requirement "would unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools" (469 U.S. at 340).[23]

The Court has also found the warrant requirement inapplicable where, in light of the nature of the search or seizure, "a warrant would do little to further" the traditional purposes of the Warrant Clause—to "assure[ ] the citizen that the intrusion is authorized by law, and that it is narrowly limited in its objectives and scope" and to "provide[ ] the detached scrutiny of a neutral magistrate, and thus ensure[ ] an objective determination whether an intrusion is justified in any given case." *Skinner* v. *Railway Labor Executives' Ass'n,* 109 S. Ct. at 1415. In the *Skinner* case, for example, the Court held that the government need not secure a warrant in order to require the blood and urine testing of railroad employees who have been involved in major train accidents. The Court explained that

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[23] See also *Skinner* v. *Railway Labor Executives' Ass'n,* 109 S. Ct. at 1416 ("the delay necessary to procure a warrant • • • may result in the destruction of valuable evidence"); *National Treasury Employees Union* v. *von Raab,* 109 S. Ct. 1384, 1391 (1989) (the mission of the Customs Service "would be compromised if it were required to seek search warrants in connection with routine, yet sensitive, employment decisions"); *O'Connor* v. *Ortega,* 480 U.S. 709, 722 (1987) (plurality opinion) ("requiring an employer to obtain a warrant whenever the employer wished to enter an employee's office, desk, or file cabinets for a work-related purpose would seriously disrupt the routine conduct of business and would be unduly burdensome").

"in light of the standardized nature of the tests and the minimal discretion vested in those charged with administering the program, there are virtually no facts for a neutral magistrate to evaluate." *Id.* at 1415-1416. See also *New York* v. *Burger*, 482 U.S. 691, 703 (1987) (search of premises of pervasively regulated business permissible where statute "perform[ed] the * * * basic functions of a warrant" and thus provided a constitutionally adequate substitute for a warrant).

2. The court of appeals misapplied those principles in requiring United States agents to secure a search warrant before they may search a foreign national's overseas residence. Indeed, the court stumbled at the outset, refusing "to treat foreign searches differently from domestic searches just because they are foreign" (Pet. App. 35a). By insisting on treating foreign and domestic searches in the same manner, the court of appeals ignored this Court's reminder that "what is reasonable depends on the context within which a search takes place." *New Jersey* v. *T.L.O.*, 469 U.S. 325, 337 (1985). Because it refused to consider the context of the search in this case, the court of appeals never addressed those aspects of foreign searches that render application of the Warrant Clause wholly inappropriate.

a. As in the *Skinner* case, a warrant in this context "would do little to further the[ ] aims" of the Warrant Clause (109 S. Ct. at 1415). A warrant is issued to empower an agent to conduct the search (Fed. R. Crim. P. 41(b); cf. *Coolidge* v. *New Hampshire*, 403 U.S. 443, 467 (1971)); to "provide[ ] the detached scrutiny of a neutral magistrate, and thus [to] ensure[ ] an objective determination whether the intrusion is justified in any given case" (*Skinner*, 109 S. Ct. at 1415); and to "assure[ ] the citizen that the intrusion * * * is narrowly limited in its objectives and scope" (*ibid.*). But a warrant issued for an overseas search serves none of those functions.

First, an American warrant would not empower the agents to go forward; as the court of appeals itself recognized, "it would be an affront to a foreign country's sovereignty if the DEA presented an American warrant and suggested that it gave the American agents all the authority they needed to search a foreign residence" (Pet. App. 35a). Mexico, in particular, takes special precautions to safeguard its sovereignty with respect to law enforcement activities within its borders. For example, the Mutual Legal Assistance Treaty recently negotiated between the United States and Mexico contains a provision stating that nothing in the treaty "empower[s] one Party's authorities to undertake, in the territorial jurisdiction of the other, the exercise and performance of the functions or authority exclusively entrusted to the authorities of that other Party by its national laws or regulations." *Mutual Legal Assistance Cooperation Treaty With Mexico*, art. 1, sec. 2, S. Treaty Doc. No. 100-13, 100th Cong., 2d Sess. (1988). The accompanying Senate Report explains that although the same principle has been "implicit in other mutual assistance treaties," the draftsmen "specifically articulated [it] in this Treaty because of special sensitivity to these issues on the part of Mexican authorities."[24] Moreover, the

[24] Compare, *e.g.*, *Treaty With Belgium on Mutual Legal Assistance in Criminal Matters*, S. Treaty Doc. No. 100-16, 100th Cong., 2d Sess. (1988); *Treaty With Thailand on Mutual Assistance in Criminal Matters*, S. Treaty Doc. No. 100-18, 100th Cong., 2d Sess. (1988); *Treaty With The Bahamas on Mutual Assistance in Criminal Matters*, S. Treaty Doc. No. 100-17, 100th Cong., 2d Sess. (1988); *Treaty With Canada on Mutual Legal Assistance in Criminal Matters*, S. Treaty

Report continues, "both countries, because of our shared border, have been concerned about making clear the limits on the authority of law enforcement agents of each country in the territory of the other." S. Exec. Rep. No. 27, 100th Cong., 2d Sess. 11 (1988).

Nor would a warrant provide meaningful protection by narrowing the scope of the search. In the typical case in which American agents work in cooperation with their foreign counterparts, "[t]he foreign officials are the ones who decide the scope of and reasonableness of any proposed search, whether the search will occur at all, and under what conditions it will be conducted." Pet. App. 79a (Wallace, J., dissenting).[25] In the present case, for example, the Mexican official who was supervising the search directed Agent Bowen to seize all of the documents contained in a certain cabinet and to sort through them at a later time. See *id.* at 89a. Even if a warrant could limit the activities of the American agents in the course of the search, it would not restrict the activities of the host country's agents; restrictions on the activities of the American agents would therefore not be likely to reduce the intrusiveness of the search, but would only ensure that the

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Doc. No. 100-14, 100th Cong., 2d Sess. (1988); *Treaty With The United Kingdom Concerning The Cayman Islands Relating to Mutual Legal Assistance in Criminal Matters*, S. Treaty Doc. No. 100-8, 100th Cong., 1st Sess. (1987). Cf. *Ramirez de Arellano* v. *Weinberger*, 745 F.2d 1500, 1561-1563 (D.C. Cir. 1984) (en banc) (Scalia, J., dissenting), vacated on other grounds, 471 U.S. 1113 (1985).

[25] Agency guidelines provide that in general "DEA representatives will not engage or participate in unilateral investigative operations or other activities outside the scope of the formal or informal agreement developed between the United States and the host government unless these activities have the express and explicit approval of a responsible host government official * * *." DEA, *DEA Agents Manual*, subch. 651, at 181 (1988).

foreign agents would conduct the portion of the search for which authority was denied to the American agents.

Finally, there is less need in the case of a foreign search than in the case of a domestic search for a magistrate's intervention to "ensure[ ] an objective determination whether an intrusion is justified in any given case." *Skinner*, 109 S. Ct. at 1415. As one commentator has noted, "[w]hen United States law enforcement officers act abroad, * * * their conduct already undergoes a series of checks that serve as the functional equivalent of a magistrate. Such activity not only receives the scrutiny of other members of the executive branch more familiar with the diplomatic and other ramifications of the action, but, in the context of a cooperative search, requires the approval of the foreign country." Note, *The Extraterritorial Applicability of the Fourth Amendment*, 102 Harv. L. Rev. 1672, 1690 (1989). In the present case, for example, the DEA agents were required to secure approval from the highest levels of the Mexican police, including from an attorney who served as the local representative of the Mexican Attorney General, and whose duties included supervising the local MFJP officers (see Pet. App. 85a). Foreign searches typically present sufficient difficulties and are sufficiently sensitive that they are given close review by officials of both countries and are not attempted except when the prospects of success are high. A magistrate's judgment as to the justification for the search is therefore not as necessary as it might be in the case of domestic law enforcement activities, where an officer may be more tempted to search on impulse or whim.

b. In addition, "the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search." *Camara* v. *Municipal Court*, 387 U.S. at 533. The logistics alone are daunting. In the first place, no United States magistrate is authorized to issue a warrant to search

overseas. The Federal Rules of Criminal Procedure certainly provide no such authority. See *United States* v. *Williams,* 617 F.2d 1063, 1072 (5th Cir. 1980) (en banc). Rule 41(a) (Fed. R. Crim. P.) provides for the issuance of search warrants, but only from "a federal magistrate or a judge of a state court of record within the district wherein the property is located." For agents working overseas, a host of practical difficulties would arise, including the frequent unavailability or inefficiency of intercontinental communications, and the inevitable delays in securing a warrant from an American magistrate.[26]

Even if a warrant to search overseas could lawfully be issued, its enforcement "would interfere to an appreciable degree" (*Griffin* v. *Wisconsin,* 107 S. Ct. at 3169) with the unusual responsibilities of our agents overseas. A warrant requirement, as Judge Wallace explained (Pet. App. 79a), "ignores the practical realities that when our agents conduct searches abroad, they are at the mercy of foreign officials." The agents must comply with the demands of their hosts; they cannot be expected to follow the competing agenda set by an American search warrant.[27] What is more, host countries typically do not wish it to be known publicly that American agents have participated in domestic law enforcement and therefore insist on strict

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[26] See Saltzburg, *The Reach of the Bill of Rights Beyond the* Terra Firma *of the United States,* 20 Va. J. Int'l L. 741, 762-763 (1980); Note, *The Extraterritorial Applicability of the Fourth Amendment,* 102 Harv. L. Rev. 1672, 1690-1691 & n.81 (1989).

[27] "To hold otherwise would be novel and would make unreasonable demands on our foreign agents, whether in law enforcement or national security, who by following the law of the country in which they are staying, could at the same time find themselves in defiance of the United States constitutional standards." *United States* v. *Toscanino,* 500 F.2d 267, 281 (2d Cir. 1974) (Anderson, J., concurring).

confidentiality. See *Hearings Before a Subcomm. of the Comm. on Government Operations on H.R. Reorganization Plan No. 1 of 1968 and H.R. Res. 1101,* 90th Cong., 2d Sess 132 (1968) (remarks of James P. Hendrik, Special Assistant Secretary of the Treasury). A warrant requirement, which may expose those confidences, may thereby impair relations with host countries that are currently willing to cooperate with American authorities.[28]

3. Because of the unusual practical constraints, as well as difficult questions of sovereignty and authority, agents conducting investigations overseas should at most be bound by the more flexible Fourth Amendment requirement of reasonableness. See *New Jersey* v. *T.L.O.,* 469 U.S. 325, 340 (1985); *United States* v. *Montoya de Hernandez,* 473 U.S. 531, 537 (1985); *United States* v. *Villamonte-Marquez,* 462 U.S. 579, 588 (1983). In applying that requirement, the courts should give great weight to the fact that officials of the host country have lent their cooperation or extended permission to United States agents to conduct the search or seizure in question.

The search of respondent's Mexicali residence easily satisfied that standard. After first attempting, without success, to contact the Second Deputy Attorney General for the Republic of Mexico, the agents secured authorization to search from Florentino Ventura, the Director General of the Mexican Federal Judicial Police.[29] Ventura

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[28] Consistent with those constraints, agency guidelines provide that "DEA involvement in Mexico will be limited to a role which results in the least possible notoriety and maximum effectiveness. This 'low profile' encompasses all matters ranging from minimum investigational staffing and limiting unnecessary use of equipment, vehicles, firearms and radios to the judicious release of information to the domestic media regarding DEA activity in Mexico." DEA, *supra,* subch. 652, at 191.

[29] Agency guidelines expressly require DEA investigative activity in Mexico to "be conducted in cooperation with the MFJP, and only after

also made available to DEA the assistance of MFJP officers in conducting the search. During the search itself, the American agents were accompanied by the Mexican officers, and they obeyed all of the commands given by the MFJP supervising officer who directed the operation. Moreover, the DEA agents acted prudently in making the seizures, taking care to ensure that what they seized was reasonably related to the purpose of the search. If the search was in any respect overbroad—perhaps because Agent Bowen, at the Mexican officer's direction, removed a remaining file of documents, or because the MFJP officers seized certain weapons and automobiles—that overbreadth cannot be charged to the American agents. Their actions were entirely reasonable, start to finish.

C. The Application Of The Fourth Amendment And The Warrant Clause In This Context Would Significantly Impair American Law Enforcement And Intelligence Gathering Efforts

The court of appeals' application of the Fourth Amendment in this setting, and its rigid insistence on a warrant, present substantial obstacles to United States law enforcement overseas. In recent years crime, and narcotics trafficking in particular, has become an increasingly international enterprise. See, *e.g.*, *United States* v. *Montoya de Hernandez*, 473 U.S. 531 (1985); *United States* v. *Villamonte-Marquez*, 462 U.S. 579 (1983). For that reason, the Drug Enforcement Administration is presently represented by 65 offices in 45 countries. In 1988 alone, DEA agents participated in overseas investigations that culminated in more than 1200 arrests of narcotics traf-

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prior approval by its Director General in Mexico City." In the event that "the MFJP is unwilling to participate, DEA will not render the assistance requested." DEA, *supra*, subch. 652, at 192.

fickers abroad. See Drug Enforcement Administration, *1990 Authorization and Budget Request to the U.S. Congress* 28 (1989). In that connection, American law enforcement agencies assist their foreign counterparts in making numerous searches and seizures abroad, including the frequent use of wiretaps. See, *e.g.*, *United States* v. *Peterson*, 812 F.2d 486 (9th Cir. 1987); *United States* v. *Toscanino*, 500 F.2d 267 (2d Cir. 1974). Requiring agents overseas to secure a warrant in the United States—even where, as here, they are otherwise authorized by the officials of the host country to conduct the search—will inordinately impair the agents' ability to do their jobs.

The court of appeals' application of the Warrant Clause threatens our intelligence gathering capabilities as well. Although the courts of appeals have generally recognized an exception to the Warrant Clause for foreign intelligence searches, see, *e.g.*, *United States* v. *Truong Dinh Hung*, 629 F.2d 908, 914 (4th Cir. 1980); *United States* v. *Butenko*, 494 F.2d 593, 605 (3d Cir.), cert. denied, 419 U.S. 881 (1974); *United States* v. *Brown*, 484 F.2d 418, 426 (5th Cir. 1973), cert. denied, 415 U.S. 960 (1974), they have suggested that, where a warrant would otherwise be required, the government must secure, at a minimum, the authorization of the Attorney General to conduct the foreign intelligence search. See *United States* v. *Ehrlichman*, 546 F.2d 910, 923-928 (D.C. Cir. 1976), cert. denied, 429 U.S. 1120 (1977). If, as the court below supposed, a warrant is routinely required for the overseas search of a foreign national's property, the implications for foreign intelligence gathering are stark: in each instance—and there will be countless numbers of them—the Attorney General will be required to issue formal approval before the intelligence mission can proceed. That is not only impossibly cumbersome and inordinately time-consuming, but, by increasing the layers of required review, it may

also compromise the security of day-to-day intelligence operations. The Fourth Amendment does not require society to absorb such costs.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

EDWARD S.G. DENNIS, JR.
Assistant Attorney General

WILLIAM C. BRYSON
Deputy Solicitor General

LAWRENCE S. ROBBINS
Assistant to the Solicitor General

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RESPONDENT'S

BRIEF

No. 88-1253

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

UNITED STATES OF AMERICA, PETITIONER

v.

RENE MARTIN VERDUGO-URQUIDEZ, RESPONDENT

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT VERDUGO

MICHAEL PANCER, Esq.
CHARLES L. GOLDBERG
PATRICK G. HALL
Goldberg, Frost & Hall
303 West "A" Street
San Diego, California 92101

Attorneys for Respondent
RENE MARTIN VERDUGO-URQUIDEZ

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MICHAEL PANCER, Esq.
CHARLES L. GOLDBERG
PATRICK Q. HALL
Goldberg, Frant & Hall
303 West "A" Street
San Diego, California 92101

Attorneys for Respondent
RENE MARTIN VERDUGO-URQUIDEZ

QUESTIONS PRESENTED

1. Whether the Fourth Amendment requires United States law enforcement officers seeking evidence in connection with a United States criminal prosecution to obtain a warrant prior to searching a briefcase seized the previous day and in the agents' exclusive control in the United States belonging to an alien in custody in the United States pursuant to a United States arrest warrant.

2. Whether the search of an alien's residence in a foreign country is unreasonable under the Fourth Amendment where the search is conceived and initiated by DEA agents in the United States and executed by DEA agents in an effort to obtain evidence for the U.S. prosecution of an individual kidnapped from Mexico at the direction of U.S. Agents and presently in U. S. custody.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

No. 88-1353

UNITED STATES OF AMERICA, PETITIONER

v.

RENE MARTIN VERDUGO-URQUIDEZ, RESPONDENT

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT VERDUGO

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 856 F.2d 1214. The opinion of the District Court is unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on August 29, 1988. A petition for rehearing was denied on November 14, 1988. On January 4, 1989, Justice O'Conner extended the time within which

to file a petition for a writ of certiorari to and including February 12, 1989. The jurisdiction of this Court is invoked under Title 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing in the place to be searched, and the persons or things to be seized.

STATEMENT

On January 24, 1986, respondent Verdugo-Urquidez was arrested pursuant to a sealed complaint. Subsequently superseding indictments were returned against him charging him with a series of violations including violating Title 21 U.S.C. Section 848 (engaging in a Continuing Criminal Enterprise), Title 21 U.S.C. Section 963 (conspiracy to import quantities of marijuana), and Title 21 U.S.C. Section 841(a) (possession with intent to distribute quantities of marijuana). (Pet. App. 1a-2a.)

Respondent Verdugo-Urquidez initially challenged the District Court's jurisdiction over him because of the manner in which the United States obtained his custody. Subsequently, respondent Verdugo-Urquidez moved the District Court to suppress all evidence obtained as a result of his unlawful arrest and the search of his residences both in Mexicali, Mexico and San Felipe, Mexico. The District Court granted the motion to suppress with respect to evidence obtained from both residences. (Pet. App. 68a-118a.)

The Government appealed the granting of the suppression motion and the Court of Appeals affirmed that judgment. (Pet. App. 1a-67a.)

On April 11, 1986, the District Court made factual findings regarding the circumstances of respondent Verdugo-Urquidez's seizure in Mexico. Over the objection of respondent, the court conducted an in camera interview of witnesses regarding the circumstances of respondent Verdugo-Urquidez's arrest as well as considering sealed affidavits submitted by the government. (ER pages 68-70)[1] At the motion hearing challenging jurisdiction over Respondent Verdugo-Urquidez, the District Court made the following findings: On January 24, 1986, while driving his car in San Felipe, Baja California, Mexico, respondent

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1/ "E.R." refers to Respondent's Excerpt of Record in the Court of Appeals.

Verdugo-Urquidez was stopped by six Mexican police officers. (Pet.App. 7a.) Respondent was then ordered from his car, arrested, handcuffed and placed in the backseat of the Mexican officers' unmarked car. With his hands still cuffed behind his back, the police forced Verdugo-Urquidez to lie face down on the car seat with his face covered by his jacket. The police then proceeded on a two hour drive to the Mexican/American Border during which time respondent was continually held on the seat and his head was covered or blindfolded. At no time did the Mexican officers explain to Verdugo-Urquidez where they were going or why he had been arrested.[2] When the Mexican officers arrived at the border, they removed respondent Verdugo-Urquidez from the car and walked him across the border to where United States Marshals waited. United States Marshals placed respondent under arrest and drove him to the United States Border Patrol station and eventually he was transferred to Metropolitan Correctional Center in San Diego. (Pet. App. 8a.)

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[2] At the motion hearing, Respondent was not permitted to cross-examine witnesses or contest these findings. Respondent argued that he was confronted by six armed men, forcibly removed from his car and held down in the back of the other car on the journey to the border. No one identified themselves. The factual findings to the contrary were not adduced as a result of any evidentiary hearing. (E.R. 73-74.)

The assistance of Mexican law enforcement officials was sought apparently after the D.E.A. Agents were unable to execute the arrest warrant in the United States. At this juncture it was determined that Respondent Verdugo-Urquidez also maintained residences in Mexicali and San Felipe, Mexico.[3] (Pet. App. 6a-7a.) In January of 1986, the United States Marshal Service contacted Mexican law enforcement officers, who upon seeing the U.S. arrest warrant indicated that Mexican officers would arrest Respondent Verdugo-Urquidez at the request of the United States. (Pet. App. 6a-7a.)

Soon after the kidnapping of respondent Verdugo-Urquidez, a formal accusation was filed by the prosecutor in the State of Baja California, Mexico, charging the six men with kidnapping. These men were subsequently permitted to enter the United States where they were apparently admitted to the Federal Witness Protection Program. (Pet. App. 8a.)

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[3] Petitioner repeatedly refers to Respondent as a citizen and resident of Mexico. Petitioner ignores the fact that Respondent was a legal resident of the United States, Alien Registration Number A19-978-670. Petitioner also neglects to advise this Court that the DEA had been attempting to execute the arrest warrant in the United States for approximately four and one-half months. (Pet. App. 6a.)

Once in Calexico, the Marshal's Office phoned the DEA resident agent in Calexico, Terry Bowen, who had been waiting for the call informing him of respondent's arrest.[4] Bowen then took custody of Respondent Verdugo-Urquidez and initially questioned him at the Calexico office (RT 762-763).[5] There, Agent Lionel Lizzaraga of the DEA, prior to advising Respondent of his Miranda rights, asked the Respondent his name, address, and birth date (RT 760-763). After respondent Verdugo-Urquidez told the agents his address in Mexico, the decision was made approximately two hours later to search respondent Verdugo-Urquidez' residences in Mexicali and San Felipe (RT 763-764). Agent Bowen discussed the prospect of searching respondent's houses in Mexico with the other agents at the Calexico office. Agent Bowen believed that a search of Verdugo-Urquidez's Mexicali residence would disclose cash proceeds from his smuggling operations as well as documentary evidence of those transactions including drug ledgers and phone books listing

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[4] Bowen conceded that he was possibly expecting this call concerning Verdugo's apprehension. This expectation was obviously based upon prior discussions with DEA Agent Maher of Washington D.C. regarding Operation Leyende, having to do with the Camarena murder investigation (R.T. 366)

[5] "R.T." refers to the Reporter's Transcript of the Record in this case.

the names and addresses of his associates. (Pet. App. 9a.) These discussions occurred while the agents were still in the United States and after respondent Verdugo-Urquidez was secure in the United States.

At approximately 9:00 on the evening of January 24, 1986, Bowen contacted DEA agent Walter White, a DEA agent stationed in Mexico City. Bowen testified that prior to his contact with the agent in Mexico City, he had not conversed with the local Mexicali commandante, Enrique Salazar, regarding seeking his assistance in conducting a search of the Mexicali residence. According to Bowen, he explained to White that it would be better off if Director General Ventura called Commandante Salazar, based on his prior experience with certain commandantes and having requests coming directly from Mexico City. (RT 425.) White contradicted Bowen testifying that Bowen expressed to him that he had discussed the prospect of a search with Commandante Salazar, and that Commandante Salazar wanted permission from Mexico City. Bowen was calling Mexico City for the purpose of obtaining direction from an official. (RT 635.)

After this phone call, White unsuccesfully attempted to contact the Second Deputy of the Attorney General's Office in Mexico City, Senior Ortega Padilla (RT 552). Similar efforts were made to contact the Director General of the Mexican Federal Judicial Po-

lice. Although White knew the acting Attorney General of Mexico, apparently no efforts were made to contact him or to contact any member of the Mexican judiciary (RT 554). On January 25, 1986, White eventually contacted Director General Ventura by telephone (RT 555). Apparently Ventura declined to contact Commandante Salazar directly, but requested that a message be delivered. According to White's testimony, Director General Ventura said it would be far easier to do it that way, and there would be "less involvement for everyone concerned." (RT 582) This message was relayed to Agent Bowen.[6]

At approximately 1:00 p.m. on January 25, after receiving the all from Agent White, Bowen assembled a team of three other DEA officers, all of whom knew that respondent Verdugo-Urquidez had been arrested and that he also was a suspect in the Camarena case and one of which was a licensed attorney in Mexico. Agent Bowen instructed his officers that they were to seized any documentary evidence relevant to Verdugo-Urquidez's alleged narcotics activity. At no time did the DEA seek approval from the Justice Department or

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6 Director General Ventura was involved directly in the investigation of the murder of DEA Agent Camarena and was reputed to have tortured numerous suspects in that investigation. Proceso, Vol. 600, May 2, 1988.

any United States Attorney's Office for the intended search in Mexico (Pet. App. 10a, 58a-59a). At no time did the DEA discuss obtaining a search warrant from an American magistrate (Pet. App. 10a-11a). Agent Bowen also testified that one of the purposes of the search was to seek evidence relating to the investigation into the death of DEA Agent Enrique Camarena. The commandante, however, was only advised that the purpose of the search was to uncover documentary evidence relating to narcotics trafficking (RT 372-374, 617).

In Mexicali, Agent Bowen requested the assistance of Commandante Salazar. At the evidentiary hearing in this matter, Agent Bowen denied knowing any information whatsoever about Commandante Salazar being a corrupt official (RT 381). This testimony, however, was contradicted by Agent Matthew J. Maher, who testified that he had learned information about the Commandante being a corrupt official from possibly DEA Agents Bowen, Lizzaraga or O'Brien (RT 679). Specifically, Maher had been advised that the commandante was involved in a number of illegal activities and was generally thought to be corrupt (RT 680-681.) DEA Agent Robert Martinez also testified that he had a discussion with Agents O'Brien, Ramos and Bowen to the effect that the Commandante was involved in illegal activities including such things

as graft and accepting bribes (RT 714). The Government subsequently objected to any further cross-examination regarding the corrupt activities of Mexican officials (RT 726). This objection was sustained by Judge Irving concluding that the good faith belief of the agents was irrelevant to the issue (RT 726). Accordingly, respondent Verdugo-Urquidez was precluded from developing the full extent of information in the possession of the DEA at the time suggesting that the Mexican officials were not acting in accordance with Mexican law.

After Agent Bowen instructed Commandante Salazar to assist in the search, Salazar had reservations and accordingly, made a phone call apparently to one of his superior officers. He also left the office purportedly to visit with the "delegado," the official representative of the Mexican Attorney General of Mexicali (Pet. App. 59a-60a). After returning, at approximately 6:00 p.m. that evening, the Commandante along with ten to fifteen MFJP officers and the DEA agents drove to the Mexicali residence. One of the MFJP officials accompanying the DEA agents was a fugitive with outstanding warrants in the Southern District of California (RT 721-722). Agent Bowen testified that he was specifically aware that one of these police officers was a fugitive at the time he

assisted in the search of the Mexicali residence (RT 776-778).

An entry team broke out the glass door and entered the residence. Subsequently all four DEA agents entered the residence, but did not search the house at this time (Pet. App. 61a). Because it was already late, and because San Felipe was two hours away, Commandante Salazar and the DEA agents decided to drive and search the San Felipe house first. A group of the MFJP officers was left to guard the Mexicali residence, but were told not to search it until they returned (Pet. App. 61a). The DEA agents and the remaining MFJP officers then drove to San Felipe.

Initially, Agent Bowen testified that he had personally been to the San Felipe residence (RT 336). Subsequently, Agent Bowen retracted this statement testifying that he had never previously been to his residence (RT 775).

Commandante Salazar and the DEA agents then contacted an occupant of the San Felipe residence, a female identified as Ms. Tafolla. Initially, the Commandante questioned Ms. Tafolla who denied knowing respondent Verdugo-Urquidez. However, after a brief search of the residence a paper was uncovered with respondent Verdugo-Urquidez's name on it. The Commandante then began arguing with Ms. Tafolla and

she finally conceded that she knew respondent Verdugo-Urquidez. Apparently Ms. Tafolla subsequently provided information that respondent Verdugo-Urquidez's other residence was, in fact, at Playa del Sol (RT 334-335). The agents were then led to a residence at Playa del Sol (RT 335). The DEA agents and the MFJP searched the Playa del Sol residence for approximately two hours (RT 338).

The District Court found that "the DEA agents actively participated in the search itself, both in terms of actually looking for relevant documentary items and identifying as relevant those documentary items discovered by MFJP officers. At the conclusion of the search, which occurred some time before midnight, the seized items were turned over to the DEA agents. The MFJP officers seized several weapons as well as a 1984 Grand Marquis. Neither the MFJP nor the DEA left a receipt or inventory identifying the seized items (Pet. App. 62a).

The Commandante and the DEA then returned to the Mexicali residence arriving approximately two hours after leaving San Felipe. The District Court found that Commandante Salazar, at least two or three of the MFJP officers, and three of the four DEA agents conducted a room by room search of the Mexicali residence. The DEA agents seized evidence thought relevant while the MFJP brought documents

they found to Agent Bowen who in turn decided whether the DEA wanted them. At this residence, the Commandante was not specifically advised as to what documents the DEA were seeking. The agents did not attempt to prepare a list of items they would be seeking and they did nothing to safeguard any valuables that might have been in the residence (Pet. App. 63a). Agent Bowen was not concerned that jewelry or money might be taken by the MFJP (RT 396). Additionally, no receipts and inventory was prepared and the agents left no notes as to what they were taking or that they had, in fact, searched the residence. No receipts of documents was ever prepared (RT 397).

Near the conclusion of the search, the Commandante advised Agent Bowen that he was tired and wanted to leave. At that time, a general seizure of all remaining documents located in the residence was made. These documents were then placed in a single briefcase and turned over to Agent Bowen (Pet. App. 64a). The agents finally left the residence at approximately 4:00 a.m. (RT 776). The agents returned to the DEA station at Calexico with the briefcase. Sometime thereafter the agents inspected the contents of the briefcase (Pet. App. 64a). At no time did the agents seek a search warrant for the briefcase (Pet. App. 10a-11a). Written reports relating to the seizure of documents were not prepared until August

of 1986, in response to a request by Assistant United States Attorney.

Of the seized evidence, the Government sought to introduce a tally sheet purportedly found during the search of the Mexicali residence, which allegedly reflected quantities of marijuana smuggled by respondent Verdugo-Urquidez into the United States (Pet. App. 64a).

II.

The District Court suppressed the evidence seized from both premises finding that the DEA agents had sufficiently participated in the search as to make the searches a "joint venture" between the American and Mexican agents. The Court found that the Fourth Amendment was intended to protect an alien already in the custody of the United States and charged in a criminal complaint, from searches of his foreign residences conducted by United States agents for the express purpose of obtaining evidence relevant to the pending prosecution (Pet. App. 214a). Accordingly, the Court held that the agents were required to secure a warrant before conducting the searches. The Court also referred to the Mexican Constitution, which similarly contains provisions requiring a warrant. The Court also rejected the Government's contention that the exclusionary rule should not apply where United States officers conducting a foreign search

followed their foreign counterparts and reasonably believed that they were proceeding lawfully. The Court noted that it was doubtful that the DEA agents' belief in the lawfulness of the searches, whether in good faith or not, could be considered reasonable. Neither Bowen nor White, the two senior agents involved in the searches, thought it necessary to seek either legal advice or legal authorization regarding the searches from local United States Attorney's Office or the Department of Justice (Pet. App. 231a). The Court finally held that the searches, even if the warrant clause were excused were unreasonable within the meaning of the Fourth Amendment. Specifically the court noted that the Government had not sought to demonstrate any exigent circumstances excusing the need for a warrant (Pet. App. 234a).

III.

The Government appealed from the District Court's order suppressing the evidence obtained from respondent's Mexicali residence. The Court of Appeals affirmed by a divided vote. The Court of Appeals held that Verdugo-Urquidez, a foreign national, may invoke the Fourth Amendment to challenge the reasonableness of a search occurring in a foreign country. The Court rejected the contention that because the Fourth Amendment begins with the phrase "the People" it does not embrace foreign nationals in United States custo-

dy, being prosecuted for criminal offenses. The Court also found it "odd indeed that aliens in the country would be entitled to a fair trial under the Sixth Amendment and to due process under the Fifth Amendment, but would not be extended the protections of the Fourth Amendment against unreasonable search and seizures of their property abroad." (Pet. App. 47a). After concluding that respondent Verdugo-Urquidez, did have a Fourth Amendment right to object, the Court concluded that the actions of the DEA agents' actions fell within the scope of the "joint venture" doctrine noting that American authorities planned and instigated the search to be used in an American trial; there was no existing Mexican investigation of respondent then under way; the DEA actions took place before, during and after the search; MFJP informed the DEA that they could keep all evidence seized during the search; it was the DEA who took the initiative in ensuring the search took place after respondent's arrest; and the DEA, when contacting the MFJP, were not only seeking assistance from the Mexican police but were asking permission to run their own operation. Also, the Court noted that Agent Bowen, in fact, specified which documents were the object of the search, evaluated documents located during the search for determination of whether they would be seized and, in fact, kept all documents.

The Court concluded that "in short, it is clear that the DEA controlled the operation." The Court finally held that notwithstanding the geographic limitation under Rule 41 of the Federal Rules of Criminal Procedure, they could not relieve the Government from its obligation to obtain a search warrant simply because the place to be searched by the Government is outside the country. "Reason to do so would be to treat foreign searches differently from domestic searches just because they occur in a foreign place." (Pet. App. 78a.)

ARGUMENT

I.

THE SEARCH OF RESPONDENT'S BRIEFCASE BY UNITED STATES AGENTS IN THE UNITED STATES, WHEN RESPONDENT, A LEGAL RESIDENT WAS IN CUSTODY REQUIRED OBTAINING A SEARCH WARRANT.

It is well settled that this Court may affirm the decision of the lower court on any grounds that is supported by the record. Jaffke v. Dunhan, 352 U.S. 28- (1957); California Bankers Assn. v. Shultz, 416 u.S. 21 (1974).

Moreover, this Court has repeatedly held that "searches conducted outside the judicial process, without prior approval by judge or magistrate are per se unreasonable." Mincey v. Arizona, 437 U.S. 385 (1978).

At the time of the search of Respondent's briefcase, Respondent Verdugo-Urquidez was and had been securely in United States custody for at least two days. Regardless of whether the initial seizure of the briefcase was lawful or unlawful, Respondent Verdugo-Urquidez, was legally in the United States in custody at the time of the search. It should be emphasized at this juncture that respondent Verdugo-Urquidez possessed legal resident status in the United States. At the time of his arrest, agents seized from his person his alien registration card.

Respondent submits that prior decisions of this Court mandate affirming the lower court's ruling suppressing the contents of the brief case. In United States v. Chadwick, 433 U.S. 1 (1977), this Court ruled that a warrant was required prior to the search of a locked footlocker, transported by Federal agents to the Federal building after the footlocker had been lawfully seized. The footlocker was taken from the open trunk of a parked automobile during the arrest of those who were in possession of the footlocker outside a train terminal. This Court noted that the agents had sufficient probable cause to believe that the footlocker contained contraband, but nonetheless held that the opening of the footlocker approximately one hour after the arrest of the defendants was unlawful:

> Once law enforcement officers have reduced luggage or other personal property not immediately associated with the person of the arrestee to their exclusive control and there is no longer any danger that the arrestee might gain access to the property to seize a weapon or destroy evidence, a search of that property is no longer an incident of the arrest. . . . In our view, when no exigency is shown to support the need for an immediate search, the warrant clause places the line at the point where the property to be searched comes under the exclusive dominion of police authorities.
>
> United States v. Chadwick, supra, at page 15.

At the evidentiary hearing conducted in the lower court, it was established that during the process of searching the Mexicali residence, the Mexican commandate apparently grew tired and placed all remaining documents in a single briefcase. This briefcase was in turned handed to DEA Agent Bowen who transported the briefcase back to the DEA office in Calexico, California. This entire time, Respondent Verdugo-Urquidez was in custody and no efforts whatsoever were made to obtain a warrant to search the briefcase concerning the remaining documents. The particularized examination of these documents, notwithstanding Bowen' knowledge that documents were in the briefcase, nonetheless constituted a search within the

meaning of the Fourth Amendment. Arizona v. Hicks, 480 U.S. 321 (1987) (holding that an officer's moving of a turntable in plain view in order to obtain serial numbers constituted a search).

Accordingly, notwithstanding the determination of the legality of the seizure of this briefcase at the Mexicali residence, the Fourth Amendment still requires suppression of the tally sheet obtained during the search of the briefcase in the United States.

II.

THE FOURTH AMENDMENT WAS INTENDED TO APPLY TO ALL PERSONS REGARDLESS OF NATIONALITY.

A. THE BILL OF RIGHTS DECLARES CERTAIN INALIENABLE RIGHTS OF ALL MEN.

In James Madison's infamous address to Congress regarding the proposed induction of a "Bill of Rights" in the United States Constitution, he proclaimed that,

> If a [Bill of Rights was] incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the Declaration of Rights.
>
> Liberty and Justice, 82 (J. Morton & P. Murphy ed. 1958).

In determining whether respondent Verdugo-Urquidez, a legal resident of the United States also with residences in Mexico, should be able to raise a constitutional challenge defensively when hailed into a United States court, this Court should remember the truths the Framers of the Constitution thought "self evident." The Framers intended Constitution's protection to apply to all individuals, thereby preserving for aliens their "unalienable rights." Hunter, R., The Extraterritorial Application of the Constitution--Unalienable Rights?, 650 Va.L.Rev. 649, 676 (1986). This assertion has two complementary components: 1. natural rights should be inviolable; and 2. natural rights should be protected from government abuse. R. Hunter Supra, at 673.

There are many historical records and commentaries explaining that Americans of the Revolutionary Era held a deeply-felt belief in the "natural rights" of man. Indeed, one need look no further than the Declaration of Independence, with its references to "the laws of nature" and "inalienable rights." The Declaration of Independence proclaimed that:

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their creator with certain unalienable rights, that among these are Life, Liberty and the Pursuit of Happiness.

> The Declaration of Independence, para 2 (U.S. 1776).

The Framers of the Constitution, similarly, adopted the natural rights theme for the Constitution. "[T]he fundamental rights to life, liberty and the pursuit of happiness, considered as individual possessions, are secured by those maxims of constitutional law which are the monuments showing the victorious progress of the race in securing to men the blessing of civilization under the reign of just and equal laws, so that , in the famous language of the Massachusetts bill of rights, the government of the commonwealth may be a government of laws and not of men. For the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself." Yick Wo v. Hopkins, 118 U.S. 356, 358, (1886).

The Framers announced to the world, through the incorporation of the Bill of Rights, that our country recognized that certain rights were "inalienable." To guarantee their inalienability, the Bill of Rights was conceived not as a grant of rights, but as a proclamation of rights that inhered in each person. The Bill of Rights, accordingly, was drafted in universal lan-

guage. J. Ragosta, Aliens Abroad: Principles For The Application of Constitutional Limitations To Federal Action, 17 Int'l L.&Pol. 287, 297 (1985).

The address, James Madison delivered to Congress, regarding the proposed induction of a Bill of Rights, reinforces the concept that the inalienability of natural rights pertains to all persons. In that address, Mr. Madison remarked that,

> It may be said, in some instances, [the Bill of Rights] do no more than state the perfect equality of mankind. This to be sure, is an absolute truth, yet it is not absolutely necessary to be inserted at the head of the Constitution.

Further historical evidence of the "natural rights" theory abounds. For example, the various states' declaration of rights that served as the forerunners of our Bill of Rights again and again emphasized that the Government was to respect the individual's rights. Thus, the preamble to the Vermont Declaration of rights explains that "all government ought to be instituted and supported, for the security and protection of the community, as such, and to enable the individuals who compose it, to enjoy their natural rights, and the other blessings which the Author of existence has bestowed upon man." Vermont Declaration of Rights (1777), reprinted in 1 B. Schwartz, A Commentary on the Constitution of the United States:

Rights of the Person (Volume 1), 170, 319 (1968).

And in enumerating the rights enjoyed by the inhabitants of Vermont, it is proclaimed:

> That the people have a right to hold themselves, their houses, papers and possessions free from search or seizure; and therefore warrants, without oaths or affirmations first made, affording a sufficient foundation for them, and whereby an officer or messenger may be commanded or required to search suspected places, or to seize any person or persons, his, her, or their property, not particularly described, are contrary to that right, and ought not to be granted.
>
> Id., c.1, art. XI, reprinted in 1 B. Schwartz, supra, at 323.

A number of other sources, from the nineteenth century to the present, support an interpretation of the Constitution that emphasizes an intent to prevent arbitrary encroachment by government on these natural "rights." See e.g., II J. Kent, Commentaries on American Law, 1 (New York 1827) ("The absolute rights of individuals may be resolved into the right of personal security, the right of personal liberty, and the right to acquire and enjoy property. These rights have been justly considered, and frequently declared, by the people of this country, to be natural, inherent, and unalienable."). As Professor Schwartz also has explained: The Dominant Conception

when the framers wrote was that stated in Blackstone: "By the absolute rights of individuals, we mean those which are so in their primary and strictest sense; such as would belong to their persons merely in a state of nature, and which every man is entitled to enjoy, whether out of society or in it." III B. Schwartz, A Commentary on the Constitution of the United States: Rights of the Person (Volume 1), 170 (1968) (emphasis in original; footnote omitted). See generally Grey, Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought, 30 Stan.L.Rev. 843 (1978); Henkin, Rights: Here and There, 81 Colum.L. Rev. 1582, 1584-90 (1981); Note, supra, 72 Va.L.Rev. at 650 n. 8 (collecting sources).

The strong natural rights theme running throughout the Declaration of Independence and the Constitution affords protection to all individuals as a consequence of their human condition. R. Hunter, supra, at 671. There is no doubt that most of the Bill of Rights involved fundamental, natural rights. As such, they should be applied abroad to limit governmental activities with respect to aliens.

Petitioner places significance upon the distinction between the term "the people" as used in the Fourth Amendment and "persons" as used in the Fifth and Sixth Amendments. In view of the intent of the

Framers to proclaim inalienable rights, no such distinction should be read into the Bill of Rights.

To the extent that Judge Wallace's dissenting opinion reaches the opposite conclusion based upon the "compact" theory, it is flawed.

Notwithstanding the characterization of the Constitution as a compact, the Bill of Rights was intended as a safeguard against inalienable rights. As such, no distinction exists with respect to citizens, legal resident aliens or foreign nationals. While official activity abroad deserves greater judicial deference than domestic activity, this Court must retain some role in preventing and punishing conduct that violates constitutional norms. R. Hunter, supra, at 674.

"Courts should abandon the distinction between citizens and aliens in favor of a constitutional doctrine for the sake of protecting both the natural rights of men and the integrity of the Constitution." Id., at 676.

B. APPLICATION OF THE FOURTEENTH AMENDMENT'S EQUAL PROTECTION CLAUSE COMPELS THE CONCLUSION THAT CERTAIN RIGHTS ARE INALIENABLE AND INSEPARABLE FROM THE INDIVIDUAL.

Consistent with the natural rights theme of the Declaration of Independence and the Constitution are

this Court's decisions regarding the application of the Fourteenth Amendment's due process and equal protection clauses which prescribe the constitutional protection that the states must provide for all people within their boundaries. It states in part:

> Nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> U. S. Const. Amend. XIV, Section 1.

This court in Graham v. Richardson, 403 U.S. 365, 372 (1971), declared that discrimination by states against aliens is "inherently suspect," subject to strict scrutiny by the courts, and only justified by compelling state interests. An exception to Graham has been made, however, in cases when a state seeks to prohibit aliens from participating "in its democratic political institutions." Foley v. Connelie, 435 U.S. 291 (1978).

In Foley, the Supreme Court held that a statute excluding aliens from a state's police force did not violate the equal protection clause of the Fourteenth Amendment, since police officers fall within the category of important nonelective officers who participate directly in the execution of broad public policy, and since, in the enforcement and execution of the laws, the police function is one where citizenship bore a

rational relationship to the special demands of the particular position. Id. In its opinion, the Court expressed:

> . . . a democratic society is ruled by its people. Thus, it is clearer that a State may deny aliens the right to vote, or to run for elective office, for these lie at the heart of our political institutions. (Citations). Similar considerations support a legislative determination to exclude aliens from jury service. (Citation). Likewise, we have recognized that citizenship may be relevant qualification for fulfilling those important nonelective executive, legislative and judicial positions, held by officers who participate directly in the formulation, execution, or review of broad public policy. (Citation). This is not because our society seeks to reserve the better jobs to its members. Rather, it is because this country entrusts many of its most important policy responsibilities to those officers, the discretionary exercise of which can often more immediately affect the lives of citizens than even the ballot of a voter or the choice of a legislator. In sum, then, it represents the choice, and right, of the people to be governed by their citizen peers. To effectuate this result, we must necessarily examine each position in question to determine whether it involves discretionary decision-making, or execution of policy, which substantially affects members of the political community. The essence of our holdings to date is that

> we extend to aliens the right to education and public welfare, along with the ability to earn a livelihood and engage in licensed professions, the right to govern is reserved for citizens. Id. at 296.

This exception to Graham is "limited" since it was based upon the recognition of a state's obligation to "preserve the basic concept of a political community" by regulating the community. While the Constitution specifically limits aspects of the democratic process to "citizens," it does not, however, so limit the universal rights and limitations given in the Constitution. "When legally admitted, aliens have come at the Nation's invitation, as visitors or permanent residents, to share with us the opportunities and satisfactions of our land. As such visitors and foreign nationals they are entitled in their persons and effects to the protection of our laws." Carlson v. Landon, 72 S.Ct. 525, 534 (1852). This Court has, further, acknowledged that the civil and property rights of immigrants or transients of foreign nationality so nearly approach equivalence to those of citizens, courts have little occasion to inquire whether litigants before them are alien or citizen. Johnson v. Eisentrager, 339 U.S. 763, 771 (1949). This Court has also recognized that "mere lawful presence in the country creates an implied assurance of safe conduct and gives [aliens] certain rights. . . ." And

at least since 1886, the Court has extended to the person and property of resident aliens important constitutional guarantees--such as the due process of law of the Fourteenth Amendment. Id.

In the pioneer case of Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886), the Supreme Court said of the Fourteenth Amendment,

> The Fourteenth Amendment is not confined to citizens. . . . These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws.

In Yick Wo, petitioner, an alien, challenged a city ordinance that was administered in a manner which blatantly discriminated against resident Chinese aliens. In ruling the ordinance "inoperative and void," the Court recognized the invidious discrimination.

Only in the occasion of war is the relative vulnerability of the alien's status exposed. The security and protection enjoyed while the nation of the alien's allegiance remains in amity with the United States are greatly impaired when the alien's nation takes up arms against us. But disabilities this county lays upon the alien who becomes also an enemy are imposed temporarily as a incident of war and not an incident of

alienage." Johnson v. Eisentrager, 339 U.S. 763, 771 (1949).

In summary, the Court has made it clear that the Fourteenth Amendment protects aliens present within the national borders. The Court has determined that discrimination against aliens is "inherently suspect" and therefore, subject to "strict scrutiny." A state may, however, discriminate on the basis of alienage to prevent aliens from performing functions "that go to the heart of representative government:" a state may forbid aliens from holding policy-making positions and from participating in the electoral process. In addition, the Government may dilute an alien's constitutional protections in the event that the United States is at war with the alien's nation. R. Hunter, supra, at 665-66. However, the Court is unfailing in its belief that the Fourteenth Amendment was intended to be applied universally and was not intended to apply only to citizens. This belief is consistent with the natural rights theme which forms the foundation of the Declaration of Independence and the Constitution. The Court, by consistently holding that the Fourteenth Amendment's protections apply "to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality" explicitly demonstrates that the Supreme Court recognizes that certain rights enumerated in the Bill of

Rights are rights that "inhere in each person," and as such are "unalienable."

Logically extended, the rights of Respondent Verdugo-Urquidez, legally entitled to reside within the United States and in fact in possession of an alien registration card, include the right to challenge the lawfulness of the search of his residence or seizure of his effects regardless of their location.

C. IT IS IMPROPER TO CONSTRAIN THE SCOPE OF THE CONSTITUTION BY RESORTING TO THE SOCIAL COMPACT THEORY OF CONSTITUTIONAL APPLICATION

Despite the limitations imposed upon an alien's constitutional protections, once the federal government allows an alien to enter the United States, an alien receives the same protections under the Constitution as a citizen. However, citizens, unlike aliens, generally benefit from strong constitutional protections when they are outside the United States. Id. at 661. Although citizens abroad retain the protections of the Bill of Rights, albeit sometimes in a diluted form, the court has not completely embraced similar protections for aliens. Id. at 664. "This is likely a result of a latent belief in the social contract theory which envisages the Constitution as a social compact that binds by mutual obligations both the government and 'We the People' of the United States.

The contract theory dictates that only parties to the contract have a right to its benefits and that such parties are afforded the benefits of the contract regardless of where they may be. In essence, under the contract theory, only American citizens have rights cognizable under the Bill of Rights. Consequently, the perspective holds constitutional protections inapplicable to aliens affected by the actions of American officials outside the United States since aliens abroad are neither parties to nor beneficiaries of the agreement between the federal government and its people embodied in the Constitution."

The compact theory has deep roots in our nation's history. The interpretation of the Constitution as a contract also has found some expression in the courts. See, e.g., Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 471, 1 L.Ed. 440 (1793) (opinion of Jay, C.J.) ("{T}he constitution of the United States is likewise a compact made by the people of the United States, to govern themselves, as to general objects, in a certain manner."); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, (1819) (Marshall, C.J.) ("The government of the Union . . . is, emphatically and truly, a government of the people. In form, and in substance, it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit."); League v. De Young, 52 U.S.

(11 How.) 185, 202, (1850) ("The Constitution of the United States was made by, and for the protection of, the people of the United States."); In re Ross, 140 U.S. 453, 464(1891) ('By the Constitution a government is ordained and established 'for the United States of America' and not for countries outside of their limits . . . . The Constitution can have no operation in another country." (Citation omitted). The compact theory also has its adherents in the academic world. See, e.g., Stephan, Constitutional Limits on International Rendition of Criminal Suspects, 20 Va.J.Int'l L. 777, 782 (1980) (observing that there is a "long held understanding that, in general, foreign nationals abroad are neither parties to nor beneficiaries of the agreement between the federal government and its people embodied in the Constitution").

The extension of the social contract theory takes a contract metaphor useful for describing the Framers' view of the proper basis for the creation of government, and attempts to use it as a rigid rule for limiting constitutional protection. R. Hunter, supra, at 653. However, notwithstanding the sources supporting such a theory, the compact theory is not a legitimate mode for applying the Constitution in this case. "Although the founding fathers may have had the image of a social contract in mind when they framed the

Constitution, a sophistic extension of the metaphor does violence to their work. The Framers used the metaphor of a social contract merely to conceptualize and explain the creation of the nation, and the metaphor should not be stretched too far." Id. at 672.

Justice Joseph Story, in his Commentaries on the Constitution of the United States cast considerable doubt on the validity of the compact theory. For instance, Justice Story found it peculiar to think of the Constitution as a contract because constitutions "are not only founded upon assent of all the people within the territorial jurisdiction, but that assent is expressly excluded by . . . {restricting} ratification . . . to those, who are qualified voters." 1 J. Story, Commentaries on the Constitution of the United States, Section 327, at 296-97 (Boston 1833). Thus, the Constitution may not be treated as a contract because it purports to bind those who did not assent to it, were not permitted to assent to it and, as well, those born after its ratification. Id. section 328 at 297-98. Justice Story purported that if the Constitution protects all "The People" of the United States, as it surely does, the protection it gives them cannot derive solely from a contract theory. Finally, in concluding that it is inappropriate to apply the concept of privity of contact to the Constitution he stated,

> It would indeed, be an extraordinary use of language to consider a declaration of rights in a Constitution, and especially of rights which it proclaims to be "unalienable and indefeasible, to be a matter of contract . . . rather than a solemn recognition . . . of those rights, arising from the law of nature and the gift of Providence, and incapable of being transferred or surrendered.
>
> Id., Section 340, at 309 (emphasis in original).

This Court, too, has moved beyond such a narrow construction of the Constitution in protecting aliens present in the United States. This Court has long recognized that aliens within the United States enjoy a broad panoply of rights. See Graham v. Richardson, 403 U.S. 365, 372 (1971); Bridge v. Wixon, 326 U.S. 135, 161(1945) (Murphy, J., concurring) (emphasizing that among the protections enjoyed by resident aliens are First, Fifth and Fourteenth Amendment rights); Kwang Hai Chew v. Colding, 344 U.S. 590, 597 (1953) (holding that a resident alien is a "person" within the meaning of the Fifth Amendment); Au Yi Lau v. INS, 445 F.2d 217, 223 (D.C. Cir.), cert. denied, 404 U.S. 864 (1971) ("Aliens in this country are sheltered by the Fourth Amendment in common with citizens"); Hampton v. Mow Sun Wong, 426 U.S. 88, 102-03 (1976) (holding that disadvantage

resulting to aliens from enforcement of a rule barring them from positions in the federal service was of sufficient significance to be characterized as the deprivation of an interest in liberty which must be accompanied by the Fifth Amendment's guarantee of due process). Even nonresident aliens have been granted constitutional rights against takings of property within the United States without just compensation. See e.g., United States v. Pink, 315 U.S. 203, 228 (1942) ("Aliens as well as citizens are entitled to the protection of the Fifth Amendment"); Russian Volunteer Fleet v. United States, 282 U.S. 481, 492 (1931) ("As alien friends are embraced within the terms of the Fifth Amendment, it cannot be said that their property is subject to confiscation here because the property of our citizens may be confiscated in the alien's country").

Through this Court's decisions extending various constitutional protections to resident aliens, this Court has acknowledged that citizenship itself cannot serve as the touchstone for the applicability of constitutional rights. Only once has this applied the privity concept. In Dred Scott v. Sanford, the court did not consider a slave to be a "citizen," therefore he could not benefit from the Constitution's protections. The Fourteenth Amendment, however, has made this case inapplicable to cases which seek to

apply the concept of privity to the Constitution J, Ragosta, supra, at 302.

This Court has also extended significant constitutional protections to aliens within the United States, without distinguishing between those who are here legally or illegally, or between resident and visitors. See, e.g., Yick Wo, at 369 ("The Fourteenth Amendment . . . is not confined to the protection of citizens . . . . {Its} provisions are universal in their application, to all persons within the territorial jurisdiction {of the United States}."); Wong Wing v. United States, 163 U.S. 228, 238 (1896) ("{A}ll persons within the territory of the United States are entitled to the protection guaranteed by the {fifth and sixth} amendments, and that even aliens shall not . . . be deprived of life, liberty, or property without due process of law."); United States ex. rel. Turner v. Williams, 194 U.S. 279, 291 (1904) (observing that fifth and sixth amendments protect aliens once they are in this country); Mathews v. Diaz, 426 U.S. 67, 77 (1976) (explaining that all aliens within the jurisdiction of the United States enjoy the protections of the Fifth and Sixth Amendments and may not be invidiously discriminated against by the federal government).

In other cases, the Court has considered specifically the constitutional protections enjoyed by ille-

gal aliens. See, e.g., Plyer v. Doe, 457 U.S. 202, 213 (1982) (holding that under the Equal Protection Clause of the Fourteenth Amendment, states may not discriminate against illegal aliens who are not within the jurisdiction of the states or the federal government and therefore are not entitled to equal protection rights). In INS v. Lopez-Mendoza, 468 U.S. 1032, 1050 (1984), this Court implicitly recognized that illegal aliens within the United States have Fourth Amendment rights. Although the Court held that an illegal alien was not entitled to invoke the exclusionary rule in a civil deportation proceeding, it did not rule out the possibility that if there developed good reason to believe that Fourth Amendment violations by INS officers were widespread that the conclusions the Court reached concerning the exclusionary rule's value might change. Id. at 1050. "By all appearances the INS {had} taken sensible and reasonable steps to deter Fourth Amendment violations by its officers, and this {made} the likely additional deterrent value of the exclusionary rule small." Id. at 1050. Interestingly, this Court also stated in its opinion that, "The INS does not suggest that the exclusionary rule should not continue to apply in criminal proceedings against an alien who unlawfully enters or remains in this country . . . ." Id. at 1042. In the dissenting opinions, four justices ex-

pressed the view that illegal aliens have Fourth Amendment rights. See Id. at 1051 (J.), Id. at 1055; White, J.) (joined in pertinent part by Stephens, J.) and Id. at 1060 (Marshall, J.).

Moreover, even the Solicitor General of the United States conceded that illegal aliens have Fourth Amendment rights in that case, Brief for Petitioner at 10-11, INS v. Lopez-Mendoza, 468 U.S. 1032 (1984).

"There are literally millions of aliens within the jurisdiction of the United States. The Fifth Amendment, as well as the Fourteenth Amendment, protects every one of these persons from deprivation of life, liberty, or property without due process of law. Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection." Mathews v. Diaz, 426 U.S. 67, 77, 96 S.Ct. 1883, 1890, (1976).

In conclusion, "the social contract metaphor provides no valid reason why constitutional principles should not similarly restrict the government when it acts on aliens outside this country. The theory makes no effort to explain why the framers, who believed in the natural rights of all persons, would limit the Constitution's protections to citizens; nor does the theory explain why proscriptions, worded as universal limitations on governmental power, would not apply when a government official happens to act upon an

alien." J. Ragosta, supra, at 303. It is apparent that the founders of our country, through the language of the Declaration of Independence and the Constitution, intended to define natural rights as being inalienable and inseparable from the individual. In addition, this Court has reinforced the concept that such rights are inalienable by way of its opinions which have described the application of certain constitutional protections as being "universal" in nature. As such, official government action against aliens both within and without the territorial jurisdiction of the United States should be restricted not only out of respect for the intentions of the founders of our country, and that of the opinions of this Court but also out of respect for the natural rights of all persons.

III

THE EXTRATERRITORIAL APPLICATION OF THE CONSTITUTION AND STATUTES COMPELS EXTENSION OF ITS PROTECTIONS ABROAD

In In re Ross, 140 U.S. 453, 464, (1890), this Court said: "The Constitution can have no operation in another country." This territorial perspective militates for confirming the protections of the Constitution within the borders of the United States and thus argues for protecting all individuals within the nation's territory. As such, Petitioner argues that

aliens although protected when within the United States because of territoriality, should not be protected from United States government conduct abroad.

The extraterritorial application of the Constitution has evolved, however, from this myopic territorial approach of the late nineteenth century. It converged with the social contract theory prevalent at the time, thus, constraining the extraterritorial application of the Constitution. And, although some courts continue to cling to such an overly restrictive view of the proper scope of constitutional protection, its force has declined in the twentieth century. R. Hunter, supra, at 651.

In Reid v. Covert, 354 U.S. at 12, Justice Black in a plurality opinion dismissed In Re Ross and its doctrine as a "relic from a different era." There, the Constitution was given effect outside the territory of the United States. In Reid, the Supreme Court held that an American citizen living overseas was entitled to a trial by jury in a prosecution for the murder of her husband, a military officer. A plurality opinion "reject{ed} the idea that when the United States acts against citizens abroad it can do so free of the Bill of Rights." Id. at 5. The plurality further expressed that "{w}hen the Government reaches out to punish a citizen who is abroad, the shield of the Bill of Rights and other parts of the

Constitution provided to protect his life and liberty should not be stripped away just because he happens to be in another land." Id. at 6. "The mere fact that {the defendant} had gone overseas with {her} husband { } should not reduce the protection the Constitution gives {her}." Id. at 33.

Since Reid, United States overseas commitments have grown even more extensive and immediate with the country assuming a role as a world leader in the movement for international protection of human rights. In response to this, a trend toward greater constitutional protection abroad for citizens has emerged.[7] Similarly, courts have afforded greater protections to aliens from U.S. government conduct abroad.

In United States v. Belmont, the Court said: "Our Constitution, laws and policies have no

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7/ In Kinsella v. United States ex rel, Singleton, 361 U.S. 234, 80 S.Ct. 297, 305, 4 L.Ed.2d 268 (1960), the Court held that a dependent of United States serviceman or civilian defense employee is protected by the specific provisions of Article III and the Fifth and Sixth Amendments and therefore could not be convicted abroad for a non-capital offense committed overseas without a trial by jury.

extraterritorial operation, unless in respect to our own citizens." 301 U.S. 324, 332 (1939). But later language, in Reid, 354 U.S. at 6, declaring that any exercise of authority by the United States is subject to constitutional limitations would seem to apply as well to acts in respect of any alien anywhere.

In United States v. Caltex, Inc., 344 U.S. 149 (1952), the Court considered claims for compensation under the Fifth Amendment by alien corporations in the Philippines. Although the Court decided that the alien corporations were not entitled to compensation, it did not rule out the possibility that future alien corporations would be entitled to Fifth Amendment protections abroad. The Court's decision was not based on the corporation's nonresident alienage status, but rather it was based upon the finding that the alien corporation's property was destroyed in the effort to "sooner destroy the enemy," and "not appropriated for subsequent use" by the United States military. Id. at 155.

Applying these rulings to the suggestions of Petitioner, obvious flaws arise in its analysis under the remaining provisions of the Constitution which this Court has already ruled apply to non-citizens (See Plyler v. Doe, 457 U.S. 202 (1982) (holding that illegal aliens are entitled to equal protection under the Fourteenth Amendment). For example, a husband,

a U.S. citizen residing in Mexico, and a wife, a non-resident alien, could not both contest the search of their foreign residence based upon the varying nature of their relationship with the United States. However, it in the process of searching the residence a violation of international law occurred, the wife could assert standing in United States courts pursuant to legislative act. 28 U.S.C. 1350. Incongruously, the Legislature deriving its authority from this same Constitution, prohibits actions occurring in foreign territory, which are prosecuted by the Executive, also a creature of this same document. Respondent stands before this court as a result of such action authorized by the Constitution. Yet Petitioner submits that the protections of this document cannot be asserted in defense. The "Compact" theory of the Constitution does not support incongruous conclusions.

IV

THE ENUMERATED POWERS DOCTRINE COMPELS FEDERAL OFFICIALS TO ACT WITHIN THE PROSCRIPTIONS OF THE CONSTITUTION REGARDLESS OF WHETHER THEY ACT AT HOME OR ABROAD

It is unnecessary to allow analysis of this issue to continue to turn upon whether particular rights are fundamental. Federal officials are bound by

all the limitations of the Constitution, at home or abroad, by reason of the enumerated powers doctrine. J. Ragosta, supra at 306.

"Wherever and whenever the {federal government} acts it relies on the Constitution as the source of its powers. Whenever it acts, it must, therefore, accept the limits on its power imposed by the . . . Constitution . . . . Thus, the Bill of Rights controls the activities of United states law enforcement officers wherever they occur." Altzburg, The Reach of the Bill of Rights Beyond the Terra Firma of the United States, 20 Va.J.Int'l L. 741, 745 (1980); See also, Russian Volunteer Fleet v. United States, 282 U.S. 481, 492 ("The provision that private property shall not be taken for public use without just compensation establishes a standard for our government which the Constitution does not make dependent upon the standards of other governments").

In Reid v. Covert, 354 U.S. 1 (1957), the Supreme Court took a major step in the development of extraterritorial constitutional application when it held that the Constitution controls actions that the United States government takes abroad. In Reid a United States military tribunal in England tried an American civilian for the murder of her husband, an Air Force officer. The murder was committed on an Air Force base in England. In noting that the constitution applied abroad, Justice Black explicitly relied upon the enumerated powers doctrine. Black stated: "The U.S. is entirely a creature of the Constitution. Its powers and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution." 354 U.S. at 5; see also id. at 56 (Frankfurter, J. concurring in the result) ("Governmental action abroad is performed under both the authority and the restrictions of the Constitution."); cf. id. at 66 (Harlan, J., concurring in the result) ("The powers of Congress . . . are constitutionally circumscribed. Under the Constitution, Congress has only such powers as are expressly granted or those that are implied as reasonably necessary and proper to carry out the granted powers.") Moreover, according to Justice Black, the Constitution's "sweeping" language applied to all United States government activities. Black's opinion however, is dictum, since Justices Frankfurter and Harlan concurred with the opinion that Reid should not apply beyond a situation involving the United States government, a citizen, and a capital offense. However, the case must be interpreted to compel federal officials to act within the proscriptions of the Constitution regardless of whether they act at home or abroad. There is no reason to limit the Reid doctrine to interactions between government and citizen, as the

doctrine operates as a limitation upon government officials, not as a grant of rights to the person being acted upon.

V.

THE SEARCH OF THE MEXICALI AND RESIDENCE VIOLATED MEXICAN LAW AND WAS GENERALLY UNREASONABLE.

Under United States v. Peterson, 812 F.2 488 (9th Cir. 1987), the Ninth Circuit held that one factor to be considered in determining the reasonableness of a foreign search is whether the search was unlawful in the particular country. Assuming that this factor is properly considered in the case at bar, a review of Mexican law is appropriate.

Article 16 of the Mexican Constitution requires a search warrant. In the court below Petitioner's suggested that the legality of the searches under Mexican law was not clear. According to the express terms of the Constitution the warrant must be in writing with provisions analogous to the Fourth Amendment relating to specificity of the place to be searched, objects sought, and particularization of items sought. The Constitution also states that at the conclusion of the search warrant there shall be a detailed statement, analogous to an inventory, which describes particular items seized. There is also an exception relating in the Mexican Constitution for administrative officials

entering homes for sanitary and police regulations in demanding examination of books and documents. These provisions are not ambiguous at all. Accordingly, the Mexcian Constitution must be construed by the plain language which requires a warrant for the actions of search in Respondent Verdugo-Urquidez's Mexicali residence.

As demonstrated in the above translation of Mexican Jurisprudence, Mexican law places no significance on a search occurring outside of the procedures established in Article 16 of the Mexican Constitution. The significance of the above-stated Mexican law is to establish that clearly under Mexican law the search of respondent Verdugo-Urquidez's residences was unlawful. A warrant was required, issued by a competent judicial authority.

This recitation of Mexican law is significant in two respects. Should this court conclude that an inquiry into the law of a foreign country is relevant to the determination of reasonableness under the Fourth Amendment, as did the Ninth Circuit in United States v. Peterson, 812 F.2d 488 (9th Cir. 1987), it is beyond dispute that the instant searches were unlawful under Mexican law.

Moreover, throughout Petitioner's arguments is the underlying premise that obtaining a warrant in a foreign country is impracticable and therefore, should be

excused under the Fourth Amendment. If this premise is true, respondent Verdugo-Urquidez submits that the burden of demonstrating the impracticability of obtaining a warrant lies with the Petitioner, Bumper v. Carolina, 291 U.S. 543 (1968), Coolidge v. New Hampshire, 403 U.S. 443, 474 (1971). Petitioner apparently seeks to avoid this burden by having this Court create a "blanket exemption" for searches occurring in a foreign country. Repeatedly, Petitioner asserts that the Fourth Amendment warrant requirement "would interfere to an appreciable degree" with the unusual responsibilities of our agents abroad. Judge Wallace, in his dissenting opinion, noted that a warrant requirement, "ignores the practical realities that when our agents conduct searches abroad, they are at the mercy of foreign officials." However, no "interference" or "realities" were demonstrated by Petitioner in the courts below. Rather as demonstrated by the cited provisions of Mexican law, the obtaining of a warrant in Mexico was practicable.

Respondent Verdugo-Urquidez can conceive of hypothetical situations in which obtaining a warrant would be impracticable. In such situations, Respondent concedes that strict adherence to the warrant requirement could be excused based upon a demonstrated showing. However, to excuse obtaining a warrant, the Government must be required to establish in each

case, the impracticalities and interference with responsibilities on a case by case basis. Welsh v. Wisconsin, 466 U.S. 740 (1984) (holding that burden is on the government to demonstrate exigent circumstances). Lewis v. United States, 385 U.S. 206, 212 (1966) (each case judged on its own facts). To merely presume that obtaining a warrant in a foreign country is impracticable in this case truly "ignores realities."

The agents conceived of the idea to conduct the search in the United States, initiated steps to obtain assistance from Mexican officials, while still in the United States, and finally searched the briefcase containing the tally sheets in issue while in the United States. Approximately two days transpired between conception of the idea for the search and the actual search. During this time a warrant could easily have been obtained either from a United States Magistrate or even a Mexican Judicial official. The Mexican Constitution, in fact, required obtaining such a warrant, and obviously means were available to the agents to obtain the warrant. Agent Bowen testified that the "Delegado" was contacted prior to departing on the search. This individual could easily have assisted in attempts to obtain a Mexican search warrant. Similarly, Rule 41 of the Federal Rules of Criminal Procedure amendments have been proposed to

permit the extra territorial application for a search warrant. In this particular instance, no impracticalities existed, nor were there any exigent circumstances posed which excused obtaining a warrant.

This is not to say that every search occurring in a foreign country must be conducted pursuant to a valid warrant issued by a United States Magistrate. In this particular case, if the requirements of the Mexican Constitution had been followed, inevitably the requirements to the Fourth Amendment to the United States Constitution could have been satisfied. Similarly, the constitutional provisions of a number of foreign countries in which DEA agents and U.S. law enforcement officials are acting have similar constitutional provisions which could satisfy requirements of the Fourth Amendment. Also, exigent circumstances obviously will arise in which obtaining a warrant is impracticable in light of the potential destruction of evidence or risk of flight. To remove the burden of demonstrating such impracticalities however, flaunts this Court's prior rulings.

VI.

THE EXCLUSIONARY RULE SHOULD BE APPLICABLE TO THE CIRCUMSTANCES OF THE SEARCH OF RESPONDENT'S RESIDENCES.

In United States v. Peterson, 812 F.2d 486 (9th Cir. 1987), a three-judge panel applied the good faith exception to the exclusionary rule to justify utilization of evidence seized pursuant to a Phillipine wiretap. Therein, the Court based this application of the good faith exception upon the stated rationale of the exclusionary rule as a deterrent.

InIllinois v. Krull, ____ U.S. ____ , the United States Supreme Court also extended the good faith exception to the exclusionary rule to the situation in which a police officer acts in objectively reasonable reliance upon the Constitutionality of a state statute. The Court stressed the prime purpose of the exclusionary rule, was to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures." Id. at p. 875.

The Court applied the three prong test utilized in United States v. Leon, 468 U.S. 897 (1984), to determine that the exclusionary rule and the purpose of the exclusionary rule would not be promulgated where a police officer relies upon the constitutionality of the state statute. On the basis of three factors, the

Leon court concluded that there was no sound reason to apply the exclusionary rule as a means of deterring misconduct on the part of judicial officers who are responsible for issuing warrant. First, the Leon court noted that the exclusionary rule was historically designed to deter police misconduct rather than to punish the errors of judges and magistrates. Secondly, the Court noted that there was no evidence suggesting that judges and magistrates would require application of the extreme sanction of exclusion. Finally, the Court concluded that there was no basis for believing that exclusion of evidence seized pursuant to a warrant would have a significant deterrent effect on the issuing judge or magistrate. In Krull, supra, the Court similarly expanded this analysis to substitute the police officer's reliance upon a judge or neutral magistrate to his reliance upon the constitutionality of a state statute and the intentions of State Legislators. Noting that the State Legislators would not significantly be deterred in light of their oath to uphold the Constitution of each individual state, the Court expanded the exceptions to the exclusionary rule to include the good faith reliance upon the constitutionality of a statute.

There are several reasons why the good faith exception should not be extended to the instant search. First, it should be emphasized that evidence

was introduced to the effect that the Commandante in charge of the Mexican Federal Judicial Police was in fact involved in illegal activities himself. Moreover, defense counsel was precluded from fully developing the issue of the corruption replete in the foreign official's actions including Ventura, the person authorizing the search. Thus, in contrast to the situation in which a neutral magistrate or state legislator is not inclined to subvert the Fourth Amendment, there was substantial evidence which could properly have been adduced to establish that foreign officials are in fact inclined to break and subvert the law of their own countries. The presumption of proper intent by magistrates and legislators does not extend to foreign officials.

The reasoning of the panel in Peterson relating to the deterrent effect of an exclusionary rule on foreign officials is plagued by numerous police considerations that suggest such an effect might exist. Primarily, any instructions by DEA agents to the effect that if the search is illegal under foreign law, their efforts would be fruitless for utilization in American courts would particularly affect foreign officials' efforts to obtain evidence legal under foreign law. Efforts to deter foreign officials from violating their own laws clearly does not place any intolerable burden upon the United States, and in fact

constitutes a proper diplomatic concern. Secondly, application of the good faith exception would in fact have an opposite effect to deterrence by inciting DEA officials to utilize foreign officials to conduct searches acting as American agents. Thus, it is hard to conceive of a situation in which a DEA agent could not rationalize any illegal search on the grounds that he merely deferred to a foreign official's actions.

Further, the United States official acting in joint ventures with foreign officials should be held accountable to obey foreign laws. The United States Supreme Court should not tolerate the U.S. agents' actions in conducting illegal searches and violating the law in foreign countries. Moreover, a deterrent effect could possibly result from their foreign counterparts desire to please American agents acting abroad. The status of the United States as a super power in world affairs should not be ignored in determining the potential deterrent effects on foreign officials as well as American officials. Thus, for numerous reasons, the analysis engaged by the Peterson panel noting the application of the good faith exception to the exclusionary rule should not be extended beyond the holding in Krull and Leon.

Moreover, extension of the good faith exception would undermine some of the inherent analysis utilized by Krull and Leon. In both Krull and

Leon, the Court recognized that an independent branch of the Government was relied upon for the determination of the legality of the search; in Leon the neutral and detached magistrate, and in Krull the state legislator vis-a-vis statutes authorizing the conduct. In both situations, the Supreme Court analyzed that reliance upon a different branch of the Government for determination of the validity of the search did not serve to further the remedial purposes of the exclusionary rule. However, the United States Supreme Court has not interposed an exception where the reliance is upon an executive branch of the Government. In Krull, the Court easily analogized the position of the neutral and detached magistrate to that of the state legislator in enacting a presumably, constitutional statute. However, such an analogy is not easily drawn between the actions of a foreign official, particularly the actions of a foreign police official. Here, in essence, the official consulted for purposes of obtaining assistance in the search of the Verdugo residences were officials of the Mexican Federal Judicial Police. Notwithstanding Petitioner's previous comparison of Director Ventura as holding a position equal to that of the Director of the FBI, there is no authority which would even suggest that the Director's approval of a search in the United

States would constitute a basis for non-application of the exclusionary rule.

Finally, extension of the good faith exception is this situation would encourage ignorance of the law as opposed to promoting understanding a full knowledge of the ramifications of DEA agents' actions. Just as a local police officer cannot justify his own illegal actions on the grounds that he thought they were reasonable, reliance upon foreign officials' actions which a DEA agent thought were reasonable similarly promotes ignorance and deception in conducting law enforcement activities. This end alone is sufficient to restrict application of the good faith exceptions to the situations contained in Krull and Leon.

A sufficient factual record was presented, which clearly undermines any determination of good faith reliance upon the actions of the foreign officials. First, it should be emphasized that Judge Irving, in his written opinion, noted that it is doubtful that the DEA agent's belief in the lawfulness of teh search, whether in good faith or not, could be considered reasonable. Noting the lack of effort to seek legal advise or authorization regarding the searches from the local U.S. Attorney's Office or the Department of Justice, the Court expressly found that Bowen's belief in the legality of the search was unreasonable under the Leon standard.

It should be emphasized that one of the DEA agents, who accompanied Agent Bowen and the other DEA agents along with the Mexican Federal Judicial Police for the search, was a Mexican attorney. Ricardo Ramos went to law school in Mexico and was licensed lawyer in the Republic of Mexico, who was familiar with the Mexican Constitution. In light of the express provisions of the Mexican Constitution, the Government cannot, in light of Ricardo Ramos' particularly unique knowledge of the law in Mexico, claim good faith ignorance of foreign law.

Secondly, it should be noted that depending upon whose testimony is accepted, the Commandante was initially reluctant, or at best, for purposes of the Government's analysis, the agent expected that the Commandante would be reluctant to conduct the search of the Mexicali and San Felipe residences. From this reluctance it easily can be inferred that the Commandante was not in a position of expressing his assurance that all provisions of the Mexican law would be met. In fact, nowhere in the record is there any testimony that any Mexican official ever expressed an opinion that the search was legal under Mexican law.

Third, the particular testimony utilized by Agent White as to the so-called "authorization" indicated merely that the actions on the part of the Mexican officials were merely an acommodation to rendering

assistance in conducting the searches desired by the DEA. According to Walter White's testimony, this way there would be "less involvement for all." Thus, Walter White was immediately aware that Director Venture was merely authorizing the easiest method for conducting the search or rendering assistance. Director Ventura wanted as little to do with the search as possible, indicating that he did not want to talk to Commandante Salazar.

Fourth, it is apparent that there was no contact whatsoever with the Attorney General's Office seeking authorization or approval for the search. For some unexplained reasons, the efforts to contact Mexican officials immediately shifted to efforts to contact Director Ventura. Thus, it is not even clear that DEA Agent Walter White conformed to any prior procedures in contacting the appropriate officials.

Next, the agents conducting the search were expressly aware that the Commandante was "generally thought to be a corrupt official." Both agents Maher and Martinez testified that they were aware, through conversations with other DEA agents, including Agent Bowen, that the Commandante had a reputation for being a corrupt official. This factor, also strongly suggests that disingenuousness of the Government's proposal that there was good faith reliance upon foreign officials' compliance with foreign law. More

importantly, the record established that one of the individuals utilized for the kidnapping of Respondent Verdugo-Urquidez had in fact in the past been involved in the kidnapping of other officials. Not only were the agents aware that the Commandante was a corrupt official, but also believed the Mexican Federal Judicial Police would do anything that the United States requested that they do, whether or not complying with foreign law. The actions of the Mexican Federal Judicial Police in kidnapping Respondent Verdugo-Urquidez were manifestly illegal under Mexican law in light of a Baja, California prosecutor's issuance of warrants for the arrest of the kidnapping agents.

Another significant factor in determination in the lack of reasonableness is the extent of participation by the DEA in the conception, instigation and initiation of the search. The accommodation by the MFJP to the desires of the DEA officials again suggests that there cannot be any good faith reliance upon the actions of the MFJP to justify the basis in application of the exclusionary rule.

The circumstances of the conduct of the search itself also indicate the unreasonableness of their actions and the complete lack of good faith in the legality of their searches. Particularly, Petitioner seeks to ignore the fact that initially at the San

Felipe residence, the DEA officials went to the wrong house.

The execution of the searches of the residence may also be examined from the standpoint of view as to the actions of the Mexican Federal Judicial Police in conducting the searches at the Mexicali residence. It is clear that the Commandante and the Mexican Federal Judicial Police seized weapons, and the Commandante himself stole Respondent Verdugo-Urquidez's Grand Marquis automobile. While conducting the searches, the agents prepared no inventory, no return, and they took no precautions whatsoever for safekeeping any valuables contained within any of the residences.

Additionally, the agents were accompanied by MFJP Official Pancho Guttierez, who in fact the agents, as well as the Commandante, knew was a fugitive from justice in the United States. Finally, the most obvious factor relating to the lack of good faith by the agents was their concealment of one of their true purposes for going to the Mexicali residence, that is, to search for evidence relating to the murder of DEA Agent Enrique Camarena.

Lastly, the wholesale seizure of documents based upon the fact that the Commandante was tired was not objectively reasonable under any standard, Mexican or United States. The action was so arbitrary and reflec-

tive of the complete disinterest in the search by the Mexican officials that the agents could not have believed this action complied with Mexican law.

The total combination of circumstances attaching to the search of the residences mandate that the reliance by the U.S. officials upon any MFJP actions was misplaced and in bad faith. These sames factors demonstrate the objectively unreasonable nature of the search, even if a warrant was not required.

CONCLUSION

Respondent respectfully requests that this Court affirm the decision of the lower court.

DATED: August 14, 1989

MICHAEL PANCER

DATED: August 14, 1989

PATRICK Q. HALL

DATED: August 14, 1989

CHARLES L. GOLDBERG

VERDUGO-URQUIDEZ, RENE MARTIN

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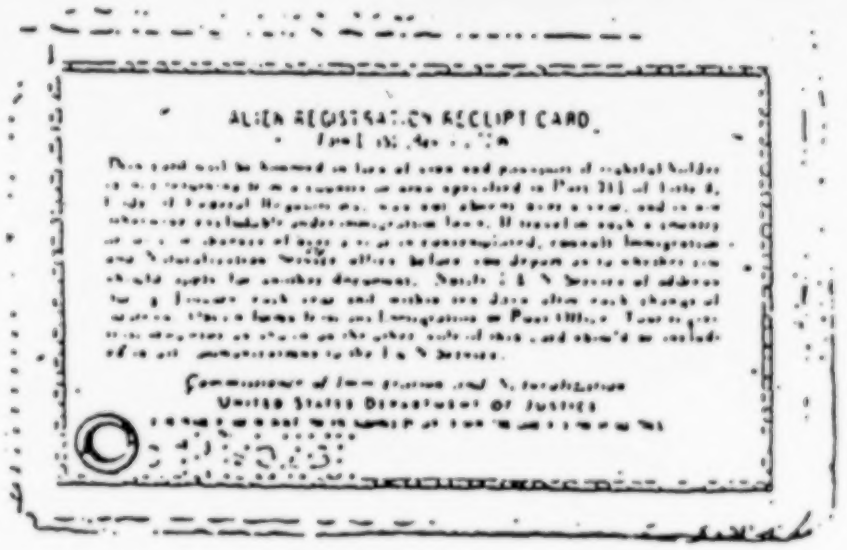
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Appendix A

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CERTIFICATE OF SERVICE

I hereby certify that I am a member of the Bar of the United States Supreme Court and that on August 14, 1989, I caused an original and forty copies of Respondent's Brief on the Merits to be mailed first class to the Clerk of the United States Supreme Court.

PATRICK Q. HALL

RESPONDENT'S

BRIEF

No. 88-1553 (9)

FILED

NOV 14 1989

JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

UNITED STATES OF AMERICA, PETITIONER

v.

RENE MARTIN VERDUGO-URQUIDEZ, RESPONDENT

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT VERDUGO

MICHAEL PANCER, Esq.
Law Offices of Michael Pancer
625 Broadway, Suite 1135
San Diego, California 92101
Telephone: (619) 236-1836

CHARLES L. GOLDBERG
PATRICK Q. HALL
Goldberg, Franz & Hall
205 West "A" Street
San Diego, California 92101
Telephone: (619) 232-6671

Attorneys for Respondent
RENE MARTIN VERDUGO-URQUIDEZ

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QUESTIONS PRESENTED

1. Whether the Fourth Amendment requires United States law enforcement officers seeking evidence in connection with a United States criminal prosecution to obtain a warrant prior to searching a briefcase seized the previous day and in the agents' exclusive control in the United States belonging to an alien in custody in the United States pursuant to a United States arrest warrant.

2. Whether the search of an alien's residence in a foreign country is unreasonable under the Fourth Amendment where the search is conceived and initiated by DEA agents in the United States and executed by DEA agents in an effort to obtain evidence for the U.S. prosecution of an individual kidnapped from Mexico at the direction of U.S. Agents and presently in U. S. custody.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

No. 88-1353

UNITED STATES OF AMERICA, PETITIONER

v.

RENE MARTIN VERDUGO-URQUIDEZ, RESPONDENT

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT VERDUGO

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 856 F.2d 1214. The opinion of the District Court is unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on August 29, 1988. A petition for rehearing was denied on November 14, 1988. On January 4, 1989, Justice O'Conner extended the time within which to file a petition for a writ of certiorari to and including February 12, 1989. The jurisdiction of this Court is invoked under Title 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Consti-

tution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT

On January 24, 1986, respondent Verdugo was arrested pursuant to a sealed complaint. Respondent Verdugo initially challenged the District Court's jurisdiction over him because of the manner in which the United States obtained his custody. Subsequently, respondent Verdugo moved the District Court to suppress all evidence obtained as a result of his unlawful arrest and the search of his residences both in Mexicali, Mexico and San Felipe, Mexico. The District Court granted the motion to suppress with respect to evidence obtained from both residences. (Pet. App. 68a-118a.) The Government appealed and the Court of Appeals affirmed that judgment. (Pet. App. 1a-67a.)

On April 11, 1986, the District Court made factual findings regarding the circumstances of respondent Verdugo's seizure in Mexico. Over the objection of respondent, the court conducted an in camera interview of witnesses regarding the circumstances of respondent Verdugo's arrest as well as considering

sealed affidavits submitted by the government. {ER pages 68-70}[1] The assistance of Mexican law enforcement officials was sought apparently after the D.E.A. Agents were unable to execute the arrest warrant in the United States. After determining that Respondent Verdugo also maintained residences in Mexicali and San Felipe, Mexico, in January of 1986, the United States Marshal Service contacted Mexican law enforcement officers. Upon seeing the U.S. arrest warrant the Mexican officers indicated they would arrest Respondent Verdugo for the United States.[2] (Pet. App. 6a-7a.) The District Court made the following findings: On January 24, 1986, while driving his car in San Felipe, Baja California, Mexico, respondent Verdugo was stopped by six Mexican police officers. (Pet.App. 7a.) Respondent was then ordered from his car, arrested, handcuffed, placed in the backseat of the Mexican officers' unmarked car and transported to

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1 "E.R." refers to Respondent's Excerpt of Record in the Court of Appeals.

2 Petitioner repeatedly refers to Respondent as a citizen and resident of Mexico. Petitioner ignores the fact that Respondent was a legal resident of the United States, Alien Registration Number A19-978-670. Petitioner also neglects to advise this Court that the DEA had been attempting to execute the arrest warrant in the United States for approximately four and one-half months. (Pet. App. 6a.)

the border.[3] When the Mexican officers arrived at the border, they removed respondent Verdugo from the car and walked him across the border to where United States Marshals waited. (Pet. App. 8a.)

Soon after the kidnapping of respondent Verdugo, a formal accusation was filed by the prosecutor in the State of Baja California, Mexico, charging the six men with kidnapping. (Pet. App. 8a.)

Once in Calexico, the Marshal's Office phoned the DEA resident agent in Calexico, Terry Bowen, who had been waiting for the call informing him of respondent's arrest.[4] Bowen then took custody of Respondent Verdugo and initially questioned him at the Calexico office (RT 762-763).[5] There, Agent Lionel Lizzaraga of the DEA, prior to advising Respondent of

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[3] At the motion hearing, Respondent was not permitted to cross-examine witnesses or contest these findings. Respondent argued that he was confronted by six armed men, forcibly removed from his car and held down in the back of the other car on the journey to the border. No one identified themselves. The factual findings to the contrary were not adduced as a result of any evidentiary hearing. (E.R. 73-74.)

[4] Bowen conceded that he was possibly expecting this call concerning Verdugo's apprehension. This expectation was obviously based upon prior discussions with DEA Agent Maher of Washington D.C. regarding Operation Leyende, having to do with the Camarena murder investigation (R.T. 366)

[5] "R.T." refers to the Reporter's Transcript of the Record in this case.

his Miranda rights, asked the Respondent his address, (RT 760-763). After being told his address in Mexico, the decision was made approximately two hours later to search respondent Verdugo' residences in Mexicali and San Felipe (RT 763-764). Agent Bowen discussed the prospect of searching respondent's houses in Mexico with the other agents at the Calexico office. While Verdugo was secure in custody Agent Bowen believed that a search of Verdugo's Mexicali residence would disclose cash proceeds from his smuggling operations, documentary evidence of those transactions including drug ledgers and phone books listing the names and addresses of his associates and possibly evidence on the Camarena investigation. (Pet. App. 9a.)

At approximately 9:00 on the evening of January 24, 1986, Bowen contacted DEA agent Walter White, stationed in Mexico City. Bowen testified that prior to his contact with the agent in Mexico City, he had not conversed with the local Mexicali commandante, Enrique Salazar, regarding seeking his assistance in conducting a search of the Mexicali residence. According to Bowen, he explained to White that it would be better off if Director General Ventura called Commandante Salazar, based on his prior experience with certain commandantes and having requests coming directly from Mexico City. (RT 425.) White contradicted Bowen testifying that Bowen expressed to him that he had discussed the prospect of a search with

Commandante Salazar, and that Commandante Salazar wanted permission from Mexico City. Bowen was calling Mexico City for the purpose of obtaining direction from an official. (RT 635.)

After this phone call, White unsuccessfully attempted to contact the Second Deputy of the Attorney General's Office in Mexico City, Senior Ortega Padilla (RT 552). Similar efforts were made to contact the Director General of the Mexican Federal Judicial Police. Although White knew the acting Attorney General of Mexico, apparently no efforts were made to contact him or to contact any member of the Mexican judiciary (RT 554). On January 25, 1986, White eventually contacted Director General Ventura by telephone (RT 555). Apparently Ventura declined to contact Commandante Salazar directly, but requested that a message be delivered. According to White's testimony, Director General Ventura said it would be far easier to do it that way, and there would be "less involvement for everyone concerned." (RT 582) This message was relayed to Agent Bowen.[6]

At approximately 1:00 p.m. on January 25, after receiving the call from Agent White, Bowen assembled a team of three other DEA officers, all of whom knew

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[6] Director General Ventura was involved directly in the investigation of the murder of DEA Agent Camarena and was reputed to have tortured numerous suspects in that investigation. Proceso, Vol. 600, May 2, 1988.

that respondent Verdugo had been arrested and that he also was a suspect in the Camarena case. One of the agents was a licensed attorney in Mexico. Agent Bowen instructed his officers that they were to seized any documentary evidence relevant to Verdugo's alleged narcotics activity. At no time did the DEA seek approval from the Justice Department or any United States Attorney's Office for the intended search in Mexico (Pet. App. 10a, 58a-59a). At no time did the DEA discuss obtaining a search warrant from an American magistrate (Pet. App. 10a-11a). Agent Bowen also testified that one of the purposes of the search was to seek evidence relating to the investigation into the death of DEA Agent Enrique Camarena. The Commandante, however, was only advised that the purpose of the search was to uncover documentary evidence relating to narcotics trafficking (RT 372-374, 617).

Agent Bowen denied knowing any information whatsoever about Commandante Salazar being a corrupt official (RT 381). This testimony, however, was contradicted by Agent Matthew J. Maher, who testified that he had learned information about the Commandante being a corrupt official from possibly DEA Agents Bowen, Lizzaraga or O'Brien (RT 679). Specifically, Maher had been advised that the commandante was involved in a number of illegal activities and was generally thought to be corrupt (RT 680-681.) DEA Agent Robert Martinez also testified that he had a

discussion with Agents O'Brien, Ramos and Bowen to the effect that the Commandante was involved in illegal activities including such things as graft and accepting bribes (RT 714). The Government subsequently objected to any further cross-examination regarding the corrupt activities of Mexican officials (RT 726). This objection was sustained by Judge Irving concluding that the good faith belief of the agents was irrelevant to the issue (RT 726). Accordingly, respondent Verdugo was precluded from developing the full extent of information in the possession of the DEA at the time suggesting that the Mexican officials were not acting in accordance with Mexican law.

After Agent Bowen instructed Commandante Salazar to assist in the search, Salazar made a phone call apparently to one of his superior officers. He also left the office purportedly to visit with the "delegado," the official representative of the Mexican Attorney General of Mexicali (Pet. App. 59a-60a). After returning, at approximately 6:00 p.m. that evening, the Commandante along with ten to fifteen MFJP officers and the DEA agents drove to the Mexicali residence. One of the MFJP officials accompanying the DEA agents was a fugitive with outstanding warrants in the Southern District of California (RT 721-722). Subsequently all four DEA agents entered the residence, but did not search the house at this time (Pet. App. 61a). Because it was already late, and because

San Felipe was two hours away, Commandante Salazar and the DEA agents decided to drive and search the San Felipe house first. A group of the MFJP officers was left to guard the Mexicali residence, but were told not to search it until they returned (Pet. App. 61a). The DEA agents and the remaining MFJP officers then drove to San Felipe.

Initially, Agent Bowen testified that he had personally been to the San Felipe residence (RT 336). Subsequently, Agent Bowen retracted this statement testifying that he had never previously been to his residence (RT 775).

After initially going to the wrong house the agents were led to a residence at Playa del Sol (RT 335). The DEA agents and the MFJP searched the Playa del Sol residence for approximately two hours (RT 338).

At the conclusion of the search, which occurred some time before midnight, the seized items were turned over to the DEA agents. The MFJP officers stole a 1984 Grand Marquis. Neither the MFJP nor the DEA left a receipt or inventory identifying the seized items (Pet. App. 62a).

The Commandante and the DEA then returned to the Mexicali residence arriving approximately two hours after leaving San Felipe. The District Court found that Commandante Salazar, at least two or three of the MFJP officers, and three of the four DEA agents conducted a room by room search of the

Mexicali residence. The DEA agents seized evidence thought relevant while the MFJP brought documents they found to Agent Bowen who in turn decided whether the DEA wanted them. At this residence, the Commandante was not specifically advised as to what documents the DEA were seeking. The agents did not attempt to prepare a list of items they would be seeking and they did nothing to safeguard any valuables that might have been in the residence (Pet. App. 63a). Agent Bowen was not concerned that jewelry or money might be taken by the MFJP (RT 396). Additionally, no receipts and inventory was prepared and the agents left no notes as to what they were taking or that they had, in fact, searched the residence. No receipts of documents was ever prepared (RT 397).

Near the conclusion of the search, the Commandante advised Agent Bowen that he was tired and wanted to leave. At that time, a general seizure of all remaining documents located in the residence was made. These documents were then placed in a single briefcase and turned over to Agent Bowen (Pet. App. 64a). The agents finally left the residence at approximately 4:00 a.m. (RT 776). The agents returned to the DEA station at Calexico with the briefcase. Sometime thereafter the agents inspected the contents of the briefcase (Pet. App. 64a). At no time did the agents seek a search warrant for the briefcase (Pet. App. 10a-11a). Written reports relating to the seizure of documents were not prepared until August

of 1986, in response to a request by Assistant United States Attorney.

A.

The District Court suppressed the evidence seized from both premises finding that the DEA agents had sufficiently participated in the search as to make the searches a "joint venture" between the American and Mexican agents. The Court found that the Fourth Amendment was intended to protect an alien already in the custody of the United States and charged in a criminal complaint, from searches of his foreign residences conducted by United States agents for the express purpose of obtaining evidence relevant to the pending prosecution (Pet. App. 214a). The Court specifically noted that it was doubtful that the DEA agents' belief in the lawfulness of the searches, whether in good faith or not, could be considered reasonable.

B.

The Court of Appeals, by a divided vote held that Verdugo, a foreign national, may invoke the Fourth Amendment to challenge the reasonableness of a search occurring in a foreign country. After concluding that respondent Verdugo, did have a Fourth Amendment right to object, the Court concluded that the actions of the DEA agents' actions fell within the scope of the "joint venture" doctrine.

The Court concluded that "in short, it is clear that the DEA controlled the operation." The Court

finally held that notwithstanding the geographic limitation under Rule 41 of the Federal Rules of Criminal Procedure, they could not relieve the Government from its obligation to obtain a search warrant simply because the place to be searched by the Government is outside the country.

ARGUMENT

I.

THE SEARCH OF RESPONDENT'S BRIEFCASE BY UNITED STATES AGENTS IN THE UNITED STATES, WHEN RESPONDENT, A LEGAL RESIDENT WAS IN CUSTODY REQUIRED OBTAINING A SEARCH WARRANT.

It is well settled that this Court may affirm the decision of the lower court on any grounds that is supported by the record. Jaffke v. Dunhan, 352 U.S. 280 (1957); California Bankers Assn. v. Shultz, 416 U.S. 21 (1974).

At the time of the search of Respondent's briefcase, Respondent Verdugo was and had been securely in United States custody for at least two days. Regardless of whether the initial seizure of the briefcase was lawful or unlawful, Respondent Verdugo, was legally in the United States in custody at the time of the search. It should be emphasized at this juncture that respondent Verdugo possessed legal resident status in the United States. At the time of his arrest, agents seized from his person his alien registration card.

Respondent submits that prior decisions of this Court mandate affirming the lower court's ruling suppressing the contents of the brief case. In United States v. Chadwick, 433 U.S. 1 (1977), this Court ruled that a warrant was required prior to the search of a locked footlocker, transported by Federal agents to the Federal building after the footlocker had been lawfully seized. Even though the agents had sufficient probable cause to believe that the footlocker contained contraband, the Court nonetheless held that the opening of the footlocker approximately one hour after the arrest of the defendants was unlawful.

At the evidentiary hearing conducted in the lower court, it was established that during the process of searching the Mexicali residence, the Mexican commandante apparently grew tired and placed all remaining documents in a single briefcase. This briefcase was in turned handed to DEA Agent Bowen who transported the briefcase back to the DEA office in Calexico, California. This entire time, Respondent Verdugo was in custody and no efforts whatsoever were made to obtain a warrant to search the briefcase concerning the remaining documents. The particularized examination of these documents, notwithstanding Bowen' knowledge that documents were in the briefcase, nonetheless constituted a search within the meaning of the Fourth Amendment. Arizona v. Hicks, 480 U.S. 321 (1987) (holding that an officer's

moving of a turntable in plain view in order to obtain serial numbers constituted a search).

Accordingly, notwithstanding the determination of the legality of the seizure of this briefcase at the Mexicali residence, the Fourth Amendment still requires suppression of the tally sheet obtained during the search of the briefcase in the United States.

II.

THE FOURTH AMENDMENT WAS INTENDED TO APPLY TO ALL PERSONS REGARDLESS OF NATIONALITY.

A. THE BILL OF RIGHTS DECLARES CERTAIN INALIENABLE RIGHTS OF ALL MEN.

In James Madison's infamous address to Congress regarding the proposed induction of a "Bill of Rights" in the United States Constitution, he proclaimed that,

> If a [Bill of Rights was] incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the Declaration of Rights.
>
> Liberty and Justice, 82 (J. Morton & P. Murphy ed. 1958).

In determining whether respondent Verdugo, a legal resident of the United States also with residences in Mexico, should be able to raise a constitutional

challenge defensively when hailed into a United States court, this Court should remember the truths the Framers of the Constitution thought "self evident." The Framers intended the Constitution's protection to apply to all individuals, thereby preserving for aliens their "unalienable rights." Hunter, R., The Extraterritorial Application of the Constitution--Unalienable Rights?, 650 Va.L.Rev. 649, 676 (1986). This assertion has two complementary components: 1. natural rights should be inviolable; and 2. natural rights should be protected from government abuse. R. Hunter Supra, at 673.

There are many historical records and commentaries explaining that Americans of the Revolutionary Era held a deeply-felt belief in the "natural rights" of man. Indeed, one need look no further than the Declaration of Independence, with its references to "the laws of nature" and self-evident "inalienable rights."

The Framers of the Constitution, similarly, adopted the natural rights theme for the Constitution. "[T]he fundamental rights to life, liberty and the pursuit of happiness, considered as individual possessions, are secured by those maxims of constitutional law which are the monuments showing the victorious progress of the race in securing to men the blessing of civilization under the reign of just and equal laws, so that , in the famous language of the Massachusetts bill of rights, the government of the common-

wealth may be a government of laws and not of men. For the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself." Yick Wo v. Hopkins, 118 U.S. 356, 358, (1886).

To guarantee their inalienability, the Bill of Rights was conceived not as a grant of rights, but as a proclamation of rights that inhered in each person. The Bill of Rights, accordingly, was drafted in universal language. J. Ragosta, Aliens Abroad: Principles For The Application of Constitutional Limitations To Federal Action, 17 Int'l L.&Pol. 287, 297 (1985).

The address, James Madison delivered to Congress, regarding the proposed induction of a Bill of Rights, reinforces the concept that the inalienability of natural rights pertains to all persons. In that address, Mr. Madison remarked that,

> It may be said, in some instances, [the Bill of Rights] do no more than state the perfect equality of mankind. This to be sure, is an absolute truth, yet it is not absolutely necessary to be inserted at the head of the Constitution.

Further historical evidence of the "natural rights" theory abounds. For example, the various states' declaration of rights that served as the fore-

runners of our Bill of Rights again and again emphasized that the Government was to respect the individual's rights. Thus, the preamble to the Vermont Declaration of rights explains that "all government ought to be instituted and supported, for the security and protection of the community, as such, and to enable the individuals who compose it, to enjoy their natural rights, and the other blessings which the Author of existence has bestowed upon man." Vermont Declaration of Rights (1777), reprinted in 1 B. Schwartz, A Commentary on the Constitution of the United States: Rights of the Person (Volume 1), 170, 319 (1968). And in enumerating the rights enjoyed by the inhabitants of Vermont, it is proclaimed:

> That the people have a right to hold themselves, their houses, papers and possessions free from search or seizure; and therefore warrants, without oaths or affirmations first made, affording a sufficient foundation for them, and whereby an officer or messenger may be commanded or required to search suspected places, or to seize any person or persons, his, her, or their property, not particularly described, are contrary to that right, and ought not to be granted.
>
> Id., c.1, art. XI, reprinted in 1 B. Schwartz, supra, at 323.

A number of other sources, from the nineteenth century to the present, support an interpretation of the Constitution that emphasizes an intent to prevent

arbitrary encroachment by government on these natural "rights." See e.g., II J. Kent, Commentaries on American Law, 1 (New York 1827) ("The absolute rights of individuals may be resolved into the right of personal security, the right of personal liberty, and the right to acquire and enjoy property. These rights have been justly considered, and frequently declared, by the people of this country, to be natural, inherent, and unalienable."). As Professor Schwartz also has explained: The Dominant Conception when the framers wrote was that stated in Blackstone: "By the absolute rights of individuals, we mean those which are so in their primary and strictest sense; such as would belong to their persons merely in a state of nature, and which every man is entitled to enjoy, whether out of society or in it." III B. Schwartz, A Commentary on the Constitution of the United States: Rights of the Person (Volume 1), 170 (1968) (emphasis in original; footnote omitted). See generally Grey, Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought, 30 Stan.L.Rev. 843 (1978); Henkin, Rights: Here and There, 81 Colum.L. Rev. 1582, 1584-90 (1981); Note, supra, 72 Va.L.Rev. at 650 n. 8 (collecting sources).

Petitioner places significance upon the distinction between the term "the people" as used in the Fourth Amendment and "persons" as used in the Fifth and Sixth Amendments. In view of the intent of the

Framers to proclaim inalienable rights, no such distinction should be read into the Bill of Rights.

To the extent that Judge Wallace's dissenting opinion reaches the opposite conclusion based upon the "compact" theory, it is flawed.

Notwithstanding the characterization of the Constitution as a compact, the Bill of Rights was intended as a safeguard against inalienable rights. As such, no distinction exists with respect to citizens, legal resident aliens or foreign nationals. While official activity abroad deserves greater judicial deference than domestic activity, this Court must retain some role in preventing and punishing conduct that violates constitutional norms. R. Hunter, supra, at 674.

"Courts should abandon the distinction between citizens and aliens in favor of a constitutional doctrine for the sake of protecting both the natural rights of men and the integrity of the Constitution." Id., at 676.

B. APPLICATION OF THE FOURTEENTH AMENDMENT'S EQUAL PROTECTION CLAUSE COMPELS THE CONCLUSION THAT CERTAIN RIGHTS ARE INALIENABLE AND INSEPARABLE FROM THE INDIVIDUAL.

Consistent with the natural rights theme of the Declaration of Independence and the Constitution are this Court's decisions regarding the application of the Fourteenth Amendment's due process and equal protection clauses which prescribe the constitutional

protection that the states must provide for all people within their boundaries.

This court in Graham v. Richardson, 403 U.S. 365, 372 (1971), declared that discrimination by states against aliens is "inherently suspect," subject to strict scrutiny by the courts, and only justified by compelling state interests. An exception to Graham has been made, however, in cases when a state seeks to prohibit aliens from participating "in its democratic political institutions." Foley v. Connelie, 435 U.S. 291 (1978).

In Foley, the Supreme Court held that a statute excluding aliens from a state's police force did not violate the equal protection clause of the Fourteenth Amendment, since police officers fall within the category of important nonelective officers who participate directly in the execution of broad public policy, and since, in the enforcement and execution of the laws, the police function is one where citizenship bore a rational relationship to the special demands of the particular position. Id. In its opinion, the Court expressed:

> . . . a democratic society is ruled by its people. Thus, it is clearer that a State may deny aliens the right to vote, or to run for elective office, for these lie at the heart of our political institutions. . . . This not because our society seeks to reserve the better jobs to its members. Rather, it is because this country entrusts many of its most important policy responsibilities to those officers, the discretionary exercise of which can often more immediately affect the lives of citizens than even the ballot of a voter or the choice of a legislator. . . . To effectuate this result, we must necessarily examine each position in question to determine whether it involves discretionary decision-making, or execution of policy, which substantially affects members of the political community.

This exception to Graham is "limited" since it was based upon the recognition of a state's obligation to "preserve the basic concept of a political community" by regulating the community. While the Constitution specifically limits aspects of the democratic process to "citizens," it does not, however, so limit the universal rights and limitations given in the Constitution. "When legally admitted, aliens have come at the Nation's invitation, as visitors or permanent residents, to share with us the opportunities and satisfactions of our land. As such visitors and foreign nationals are entitled in their persons and effects to the protection of our laws." Carlson v. Landon, 72 S.Ct. 525, 534 (1852). This Court has, further, acknowledged that the civil and property rights of immigrants or tranzients of foreign nationality so nearly approach equivalence to those of citizens, courts have little occasion to inquire whether litigants before them are alien or citizen. Johnson v. Eisentrager, 339 U.S. 763, 771 (1949). This

Court has also recognized that "mere lawful presence in the country creates an implied assurance of safe conduct and gives [aliens] certain rights. . . ." And at least since 1886, the Court has extended to the person and property of resident aliens important constitutional guarantees--such as the due process of law of the Fourteenth Amendment. Id.

In the pioneer case of Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886), the Supreme Court said of the Fourteenth Amendment,

> The Fourteenth Amendment is not confined to citizens. . . . These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws.

In Yick Wo, petitioner, an alien, challenged a city ordinance that was administered in a manner which blatantly discriminated against resident Chinese aliens. In ruling the ordinance "inoperative and void," the Court recognized the invidious discrimination.

Only in the occasion of war is the relative vulnerability of the alien's status exposed. The security and protection enjoyed while the nation of the alien's allegiance remains in amity with the United States are greatly impaired when the alien's nation takes up arms against us. But disabilities this country lays upon

the alien who becomes also an enemy are imposed temporarily as a incident of war and not an incident of alienage." Johnson v. Eisentrager, 339 U.S. 763, 771 (1949).

In summary, the Court has made it clear that the Fourteenth Amendment protects aliens present within the national borders. The Court has determined that discrimination against aliens is "inherently suspect" and therefore, subject to "strict scrutiny." A state may, however, discriminate on the basis of alienage to prevent aliens from performing functions "that go to the heart of representative government:" a state may forbid aliens from holding policy-making positions and from participating in the electoral process. In addition, the Government may dilute an alien's constitutional protections in the event that the United States is at war with the alien's nation. R. Hunter, supra, at 665-66. However, the Court has been unfailing in its belief that the Fourteenth Amendment was intended to be applied universally and was not intended to apply only to citizens which is consistent with the natural rights theme which forms the foundation of the Declaration of Independence and the Constitution.

Logically extended, the rights of Respondent Verdugo, legally entitled to reside within the United States and in fact in possession of an alien registration card, include the right to challenge the lawfulness of the search of his residence or seizure of his effects regardless of their location.

C. IT IS IMPROPER TO CONSTRAIN THE SCOPE OF THE CONSTITUTION BY RESORTING TO THE SOCIAL COMPACT THEORY OF CONSTITUTIONAL APPLICATION

The contract theory dictates that only parties to the contract have a right to its benefits and that such parties are afforded the benefits of the contract regardless of where they may be. In essence, under the contract theory, only American citizens have rights cognizable under the Bill of Rights. Consequently, the perspective holds constitutional protections inapplicable to aliens affected by the actions of American officials outside the United States since aliens abroad are neither parties to nor beneficiaries of the agreement between the federal government and its people embodied in the Constitution."

The interpretation of the Constitution as a contract has found some expression in the courts. See, e.g., Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 471, 1 L.Ed. 440 (1793) (opinion of Jay, C.J.). ("{T}he constitution of the United States is likewise a compact made by the people of the United States, to govern themselves, as to general objects, in a certain manner."); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, (1819) (Marshall, C.J.) ("The government of the Union . . . is, emphatically and truly, a government of the people. In form, and in substance, it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and

for their benefit."); League v. De Young, 52 U.S. (11 How.) 185, 202, (1850) ("The Constitution of the United States was made by, and for the protection of, the people of the United States."); In re Ross, 140 U.S. 453, 464(1891) ('By the Constitution a government is ordained and established 'for the United States of America' and not for countries outside of their limits . . . . The Constitution can have no operation in another country." (Citation omitted). The compact theory also has its adherents in the academic world. See, e.g., Stephan, Constitutional Limits on International Rendition of Criminal Suspects, 20 Va.J.Int'l L. 777, 782 (1980) (observing that there is a "long held understanding that, in general, foreign nationals abroad are neither parties to nor beneficiaries of the agreement between the federal government and its people embodied in the Constitution").

The extension of the social contract theory takes a contract metaphor useful for describing the Framers' view of the proper basis for the creation of government, and attempts to use it as a rigid rule for limiting constitutional protection. R. Hunter, supra, at 653. However, notwithstanding the sources supporting such a theory, the compact theory is not a legitimate mode for applying the Constitution in this case. "Although the founding fathers may have had the image of a social contract in mind when they framed the Constitution, a sophistic extension of the metaphor

does violence to their work. The Framers used the metaphor of a social contract merely to conceptualize and explain the creation of the nation, and the metaphor should not be stretched too far." Id. at 672.

Justice Joseph Story, in his Commentaries on the Constitution of the United States cast considerable doubt on the validity of the compact theory. For instance, Justice Story found it peculiar to think of the Constitution as a contract because constitutions "are not only founded upon assent of all the people within the territorial jurisdiction, but that assent is expressly excluded by . . . {restricting} ratification . . . to those, who are qualified voters." 1 J. Story, Commentaries on the Constitution of the United States, Section 327, at 296-97 (Boston 1833). Thus, the Constitution may not be treated as a contract because it purports to bind those who did not assent to it, were not permitted to assent to it and, as well, those born after its ratification. Id. section 328 at 297-98. Justice Story purported that if the Constitution protects all "The People" of the United States, as it surely does, the protection it gives them cannot derive solely from a contract theory. Finally, in concluding that it is inappropriate to apply the concept of privity of contact to the Constitution he stated,

> It would indeed, be an extraordinary use of language to consider a declaration of rights in a Constitution, and especially of rights which it proclaims

> to be "unalienable and indefeasible, to be a matter of contract . . . rather than a solemn recognition . . . of those rights, arising from the law of nature and the gift of Providence, and incapable of being transferred or surrendered.
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> Id., Section 340, at 309 (emphasis in original).

This Court, too, has moved beyond such a narrow construction of the Constitution in protecting aliens present in the United States. This Court has long recognized that aliens within the United States enjoy a broad panoply of rights. See Graham v. Richardson, 403 U.S. 365, 372 (1971); Bridge v. Wixon, 326 U.S. 135, 161(1945) (Murphy, J., concurring) (emphasizing that among the protections enjoyed by resident aliens are First, Fifth and Fourteenth Amendment rights); Kwang Hai Chew v. Colding, 344 U.S. 590, 597 (1953) (holding that a resident alien is a "person" within the meaning of the Fifth Amendment); Au Yi Lau v. INS, 445 F.2d 217, 223 (D.C. Cir.), cert. denied, 404 U.S. 864 (1971) ("Aliens in this country are sheltered by the Fourth Amendment in common with citizens"); Hampton v. Mow Sun Wong, 426 U.S. 88, 102-03 (1976) (holding that disadvantage resulting to aliens from enforcement of a rule barring them from positions in the federal service was of sufficient significance to be characterized as the deprivation of an interest in liberty which must be

accompanied by the Fifth Amendment's guarantee of due process). Even nonresident aliens have been granted constitutional rights against takings of property within the United States without just compensation. See e.g., United States v. Pink, 315 U.S. 203, 228 (1942) ("Aliens as well as citizens are entitled to the protection of the Fifth Amendment"); Russian Volunteer Fleet v. United States, 282 U.S. 481, 492 (1931) ("As alien friends are embraced within the terms of the Fifth Amendment, it cannot be said that their property is subject to confiscation here because the property of our citizens may be confiscated in the alien's country").

This Court has also extended significant constitutional protections to aliens within the United States, without distinguishing between those who are here legally or illegally, or between resident and visitors. See, e.g., Yick Wo, at 369 ("The Fourteenth Amendment . . . is not confined to the protection of citizens . . . . {Its} provisions are universal in their application, to all persons within the territorial jurisdiction {of the United States}."); Wong Wing v. United States, 163 U.S. 228, 238 (1896) ("{A}ll persons within the territory of the United States are entitled to the protection guaranteed by the {fifth and sixth} amendments, and that even aliens shall not . . . be deprived of life, liberty, or property without due process of law."); United States ex. rel. Turner v. Williams, 194 U.S. 279, 291 (1904) (observ-

ing that fifth and sixth amendments protect aliens once they are in this country); Mathews v. Diaz, 426 U.S. 67, 77 (1976) (explaining that all aliens within the jurisdiction of the United States enjoy the protections of the Fifth and Sixth Amendments and may not be invidiously discriminated against by the federal government).

In other cases, the Court has considered specifically the constitutional protections enjoyed by illegal aliens. See, e.g., Plyer v. Doe, 457 U.S. 202, 213 (1982) (holding that under the Equal Protection Clause of the Fourteenth Amendment, states may not discriminate against illegal aliens who are not within the jurisdiction of the states or the federal government and therefore are not entitled to equal protection rights). In INS v. Lopez-Mendoza, 468 U.S. 1032, 1050 (1984), this Court implicitly recognized that illegal aliens within the United States have Fourth Amendment rights. Although the Court held that an illegal alien was not entitled to invoke the exclusionary rule in a civil deportation proceeding, it did not rule out the possibility that if there developed good reason to believe that Fourth Amendment violations by INS officers were widespread that the conclusions the Court reached concerning the exclusionary rule's value might change. Id. at 1050. "By all appearances the INS {had} taken sensible and reasonable steps to deter Fourth Amendment violations by its officers, and this {made} the likely additional

deterrent value of the exclusionary rule small." Id. at 1050. Interestingly, this Court also stated in its opinion that, "The INS does not suggest that the exclusionary rule should not continue to apply in criminal proceedings against an alien who unlawfully enters or remains in this country . . . ." Id. at 1042. In the dissenting opinions, four justices expressed the view that illegal aliens have Fourth Amendment rights. See Id. at 1051 (J.), Id. at 1055; (White, J.) (joined in pertinent part by Stephens, J.) and Id. at 1060 (Marshall, J.).

Moreover, even the Solicitor General of the United States conceded that illegal aliens have Fourth Amendment rights in that case, Brief for Petitioner at 10-11, INS v. Lopez-Mendoza, 468 U.S. 1032 (1984).

"There are literally millions of aliens within the jurisdiction of the United States. The Fifth Amendment, as well as the Fourteenth Amendment, protects every one of these persons from deprivation of life, liberty, or property without due process of law. Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection." Mathews v. Diaz, 426 U.S. 67, 77, 96 S.Ct. 1883, 1890, (1976).

In conclusion, the social contract metaphor provides no valid reason why constitutional principles should not similarly restrict the government when it acts on aliens outside this country. The theory makes no effort to explain why the framers, who believed in

the natural rights of all persons, would limit the Constitution's protections to citizens; nor does the theory explain why proscriptions, worded as universal limitations on governmental power, would not apply when a government official happens to act upon an alien." It is apparent that the founders of our country, through the language of the Declaration of Independence and the Constitution, intended to define natural rights as being inalienable and inseparable from the individual. In addition, this Court has reinforced the concept that such rights are inalienable by way of its opinions which have described the application of certain constitutional protections as being "universal" in nature. As such, official government action against aliens both within and without the territorial jurisdiction of the United States should be restricted not only out of respect for the intentions of the founders of our country, and that of the opinions of this Court but also out of respect for the natural rights of all persons.

III

THE EXTRATERRITORIAL APPLICATION OF THE CONSTITUTION AND STATUTES COMPELS EXTENSION OF ITS PROTECTIONS ABROAD

In In re Ross, 140 U.S. 453, 464, (1890), this Court said: "The Constitution can have no operation in another country." This territorial perspective militates for confirming the protections of the Constitution within the borders of the United States

and thus argues for protecting all individuals within the nation's territory. As such, Petitioner argues that aliens although protected when within the United States because of territoriality, should not be protected from United States government conduct abroad.

The extraterritorial application of the Constitution has evolved, however, from this myopic territorial approach of the late nineteenth century. It converged with the social contract theory prevalent at the time, thus, constraining the extraterritorial application of the Constitution. And, although some courts continue to cling to such an overly restrictive view of the proper scope of constitutional protection, its force has declined in the twentieth century. R. Hunter, supra, at 651.

In Reid v. Covert, 354 U.S. at 12, Justice Black in a plurality opinion dismissed In Re Ross and its doctrine as a "relic from a different era." There, the Constitution was given effect outside the territory of the United States. In Reid, the Supreme Court held that an American citizen living overseas was entitled to a trial by jury in a prosecution for the murder of her husband, a military officer. A plurality opinion "reject{ed} the idea that when the United States acts against citizens abroad it can do so free of the Bill of Rights." Id. at 5. The plurality further expressed that "{w}hen the Government reaches out to punish a citizen who is abroad, the shield of the Bill of Rights and other parts of the

Constitution provided to protect his life and liberty should not be stripped away just because he happens to be in another land." Id. at 6. "The mere fact that {the defendant} had gone overseas with {her} husband { } should not reduce the protection the Constitution gives {her}." Id. at 33.

Since Reid, United States overseas commitments have grown even more extensive and immediate with the country assuming a role as a world leader in the movement for international protection of human rights. In response to this, a trend toward greater constitutional protection abroad for citizens has emerged.[7] Similarly, courts have afforded greater protections to aliens from U.S. government conduct abroad.

In United States v. Belmont, the Court said: "Our Constitution, laws and policies have no extraterritorial operation, unless in respect to our own citizens." 301 U.S. 324, 332 (1939). But later language, in Reid, 354 U.S. at 6, declaring that any exercise of authority by the United States is subject

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[7] In Kinsella v. United States ex rel. Singleton, 361 U.S. 234, 80 S.Ct. 297, 305, 4 L.Ed.2d 268 (1960), the Court held that a dependent of United States serviceman or civilian defense employee is protected by the specific provisions of Article III and the Fifth and Sixth Amendments and therefore could not be convicted abroad for a non-capital offense committed overseas without a trial by jury.

to constitutional limitations would seem to apply as well to acts in respect of any alien anywhere.

In United States v. Caltex, Inc., 344 U.S. 149 (1952), the Court considered claims for compensation under the Fifth Amendment by alien corporations in the Philippines. Although the Court decided that the alien corporations were not entitled to compensation, it did not rule out the possibility that future alien corporations would be entitled to Fifth Amendment protections abroad. The Court's decision was not based on the corporation's nonresident alienage status, but rather it was based upon the finding that the alien corporation's property was destroyed in the effort to "sooner destroy the enemy," and "not appropriated for subsequent use" by the United States military. Id. at 155.

Applying these rulings to the suggestions of Petitioner, obvious flaws arise in its analysis under the remaining provisions of the Constitution which this Court has already ruled apply to non-citizens (See Pyler v. Doe, 457 U.S. 202 (1982) (holding that illegal aliens are entitled to equal protection under the Fourteenth Amendment)). For example, a husband, a U.S. citizen residing in Mexico, and a wife, a non-resident alien, could not both contest the search of their foreign residence based upon the varying nature of their relationship with the United States. However, if in the process of searching the residence a violation of international law occurred, the wife

could assert standing in United States courts pursuant to legislative act. 28 U.S.C. 1350. Incongruously, the Legislature deriving its authority from this same Constitution, prohibits actions occurring in foreign territory, which are prosecuted by the Executive, also a creature of this same document. Respondent stands before this court as a result of such action authorized by the Constitution. Yet Petitioner submits that the protections of this document cannot be asserted in defense.

IV

THE ENUMERATED POWERS DOCTRINE COMPELS FEDERAL OFFICIALS TO ACT WITHIN THE PROSCRIPTIONS OF THE CONSTITUTION REGARDLESS OF WHETHER THEY ACT AT HOME OR ABROAD

It is unnecessary to allow analysis of this issue to continue to turn upon whether particular rights are fundamental. Federal officials are bound by all the limitations of the Constitution, at home or abroad, by reason of the enumerated powers doctrine.

"Wherever and whenever the {federal government} acts it relies on the Constitution as the source of its powers. Whenever it acts, it must, therefore, accept the limits on its power imposed by the . . . Constitution . . . . Thus, the Bill of Rights controls the activities of United states law enforcement officers wherever they occur." Altzburg, The Reach of the Bill of Rights Beyond the Terra Firma of the

United States, 20 Va.J.Int'l L. 741, 745 (1980); See also, Russian Volunteer Fleet v. United States, 282 U.S. 481, 492 ("The provision that private property shall not be taken for public use without just compensation establishes a standard for our government which the Constitution does not make dependent upon the standards of other governments").

In Reid v. Covert, 354 U.S. 1 (1957), the Supreme Court took a major step in the development of extraterritorial constitutional application when it held that the Constitution controls actions that the United States government takes abroad. In Reid a United States military tribunal in England tried an American civilian for the murder of her husband, an Air Force officer on a base in England. In noting that the constitution applied abroad, Justice Black explicitly relied upon the enumerated powers doctrine. Black stated: "The U.S. is entirely a creature of the Constitution. Its powers and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution." 354 U.S. at 5; see also id. at 56 (Frankfurter, J. concurring in the result) ("Governmental action abroad is performed under both the authority and the restrictions of the Constitution."); cf. id. at 66 (Harlan, J., concurring in the result) ("The powers of Congress . . . are constitutionally circumscribed. Under the Constitution, Congress has only such powers as are expressly granted or those that are implied as reasonably necessary and proper to carry out the granted powers.") Moreover, according to Justice Black, the Constitution's "sweeping" language applied to all United States government activities. Black's opinion however, is dictum, since Justices Frankfurter and Harlan concurred with the opinion that Reid should not apply beyond a situation involving the United States government, a citizen, and a capital offense. However, the case must be interpreted to compel federal officials to act within the proscriptions of the Constitution regardless of whether they act at home or abroad. There is no reason to limit the Reid doctrine to interactions between government and citizen, as the doctrine operates as a limitation upon government officials, not as a grant of rights to the person being acted upon.

V.

THE SEARCH OF THE MEXICALI RESIDENCE VIOLATED MEXICAN LAW AND WAS GENERALLY UNREASONABLE

Under United States v. Peterson, 812 F.2 488 (9th Cir. 1987), the Ninth Circuit held that one factor to be considered in determining the reasonableness of a foreign search is whether the search was unlawful in the particular country. Assuming that this factor is properly considered in the case at bar, a review of Mexican law is appropriate.

Article 16 of the Mexican Constitution requires a search warrant. In the court below Petitioner's sug-

gested that the legality of the searches under Mexican law was not clear. According to the express terms of the Constitution the warrant must be in writing with provisions analogous to the Fourth Amendment relating to specificity of the place to be searched, objects sought, and particularization of items sought. The Constitution also states that at the conclusion of the search warrant there shall be a detailed statement, analogous to an inventory, which describes particular items seized. There is also an exception relating in the Mexican Constitution for administrative officials entering homes for sanitary and police regulations in demanding examination of books and documents. These provisions are not ambiguous at all. Accordingly, the Mexican Constitution must be construed by the plain language which requires a warrant for the actions of search in Respondent Verdugo's Mexicali residence. Mexican law places no significance on a search occurring outside of the procedures established in Article 16 of the Mexican Constitution.

This recitation of Mexican law is significant in two respects. Should this court conclude that an inquiry into the law of a foreign country is relevant to the determination of reasonableness under the Fourth Amendment, as did the Ninth Circuit in United States v. Peterson, 812 F.2d 488 (9th Cir. 1987), it is beyond dispute that the instant searches were unlawful under Mexican law.

Moreover, throughout Petitioner's arguments is the underlying premise that obtaining a warrant in a foreign country is impracticable and therefore, should be excused under the Fourth Amendment. If this premise is true, respondent Verdugo submits that the burden of demonstrating the impracticability of obtaining a warrant lies with the Petitioner, Bumper v. Carolina, 291 U.S. 543 (1968), Coolidge v. New Hampshire, 403 U.S. 443, 474 (1971). Petitioner apparently seeks to avoid this burden by having this Court create a "blanket exemption" for searches occurring in a foreign country. Repeatedly, Petitioner asserts that the Fourth Amendment warrant requirement "would interfere to an appreciable degree" with the unusual responsibilities of our agents abroad. Judge Wallace, in his dissenting opinion, noted that a warrant requirement, "ignores the practical realities that when our agents conduct searches abroad, they are at the mercy of foreign officials." However, no "interference" or "realities" were demonstrated by Petitioner in the courts below. Rather as demonstrated by the cited provisions of Mexican law, the obtaining of a warrant in Mexico was practicable.

Respondent Verdugo can conceive of hypothetical situations in which obtaining a warrant would be impracticable. In such situations, Respondent concedes that strict adherence to the warrant requirement could be excused based upon a demonstrated showing. However, to excuse obtaining a warrant, the Government

must be required to establish the impracticalities and interference with responsibilities on a case by case basis. Welsh v. Wisconsin, 466 U.S. 740 (1984) (holding that burden is on the government to demonstrate exigent circumstances). Lewis v. United States, 385 U.S. 206, 212 (1966) (each case judged on its own facts). To merely presume that obtaining a warrant in a foreign country is impracticable in this case truly "ignores realities."

The agents conceived of the idea to conduct the search in the United States, initiated steps to obtain assistance from Mexican officials, while still in the United States, and finally searched the briefcase containing the tally sheets in issue while in the United States. Approximately two days transpired between conception of the idea for the search and the actual search of the briefcase. During this time a warrant could easily have been obtained either from a United States Magistrate or even a Mexican Judicial official. The Mexican Constitution, in fact, required obtaining such a warrant, and obviously means were available to the agents to obtain the warrant. Agent Bowen testified that the "Delegado" was contacted prior to departing on the search. This individual could easily have assisted in attempts to obtain a Mexican search warrant. Similarly, Rule 41 of the Federal Rules of Criminal Procedure amendments have been proposed to permit the extra territorial application for a search warrant. In this particular in-

stance, no impracticalities existed, nor were there any exigent circumstances posed which excused obtaining a warrant.

This is not to say that every search occurring in a foreign country must be conducted pursuant to a valid warrant issued by a United States Magistrate. In this particular case, if the requirements of the Mexican Constitution had been followed, inevitably the requirements to the Fourth Amendment to the United States Constitution could have been satisfied. Similarly, the constitutional provisions of a number of foreign countries in which DEA agents and U.S. law enforcement officials are acting have similar constitutional provisions which could satisfy requirements of the Fourth Amendment. Also, exigent circumstances obviously will arise in which obtaining a warrant is impracticable in light of the potential destruction of evidence or risk of flight. To remove the burden of demonstrating such impracticalities however, flaunts this Court's prior rulings.

VI.

THE EXCLUSIONARY RULE SHOULD BE APPLICABLE TO THE CIRCUMSTANCES OF THE SEARCH OF RESPONDENT'S RESIDENCES

In United States v. Peterson, 812 F.2d 486 (9th Cir. 1987), a three-judge panel applied the good faith exception to the exclusionary rule to justify utilization of evidence seized pursuant to a Philippine wiretap. Therein, the Court based this applica-

tion of the good faith exception upon the stated rationale of the exclusionary rule as a deterrent.

In Illinois v. Krull, 480 U.S. 340 (1987), this Court also extended the good faith exception to the exclusionary rule to the situation in which a police officer acts in objectively reasonable reliance upon the constitutionality of a state statute. The Court stressed the prime purpose of the exclusionary rule, was to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures." Id. at p. 875.

The Court applied the three prong test utilized in United States v. Leon, 468 U.S. 897 (1984), to determine that the exclusionary rule and the purpose of the exclusionary rule would not be promulgated where a police officer relies upon the constitutionality of the state statute. The Leon court noted that the exclusionary rule was historically designed to deter police misconduct rather than to punish the errors of judges and magistrates. Secondly, the Court noted that there was no evidence suggesting that judges and magistrates would require application of the extreme sanction of exclusion. Finally, the Court concluded that there was no basis for believing that exclusion of evidence seized pursuant to a warrant would have a significant deterrent effect on the issuing judge or magistrate. In Krull, supra, the Court similarly expanded this analysis to substitute the police officer's reliance upon a judge or neutral magistrate to his reliance upon the constitutionality of a state statute and the intentions of State Legislators.

There are several reasons why the good faith exception should not be extended to the instant search. First, it should be emphasized that evidence was introduced to the effect that the Commandante in charge of the Mexican Federal Judicial Police was in fact involved in illegal activities himself. Moreover, defense counsel was precluded from fully developing the issue of the corruption replete in the foreign official's actions including Ventura, the person authorizing the search. Thus, in contrast to the situation in which a neutral magistrate or state legislator is not inclined to subvert the Fourth Amendment, there was substantial evidence which could properly have been adduced to establish that foreign officials are in fact inclined to break and subvert the law of their own countries. The presumption of proper intent by magistrates and legislators does not extend to foreign officials.

The reasoning of the panel in Peterson relating to the deterrent effect of an exclusionary rule on foreign officials is plagued by numerous police considerations that suggest such an effect might exist. Primarily, any instructions by DEA agents to the effect that if the search is illegal under foreign law, their efforts would be fruitless for utilization in American courts would particularly affect foreign

officials' efforts to obtain evidence legal under foreign law. Efforts to deter foreign officials from violating their own laws clearly does not place any intolerable burden upon the United States, and in fact constitutes a proper diplomatic concern. Secondly, application of the good faith exception would in fact have an opposite effect to deterrence by inciting DEA officials to utilize foreign officials to conduct searches acting as American agents. Thus, it is hard to conceive of a situation in which a DEA agent could not rationalize any illegal search on the grounds that he merely deferred to a foreign official's actions.

Further, the United States official acting in joint ventures with foreign officials should be held accountable to obey foreign laws. The United States Supreme Court should not tolerate the U.S. agents' actions in conducting illegal searches and violating the law in foreign countries. Moreover, a deterrent effect could possibly result from their foreign counterparts desire to please American agents acting abroad. The status of the United States as a super power in world affairs should not be ignored in determining the potential deterrent effects on foreign officials as well as American officials.

In both Krull and Leon, the Court recognized that an independent branch of the Government was relied upon for the determination of the legality of the search. In both situations, the Supreme Court analyzed that reliance upon a different branch of the

Government for determination of the validity of the search did not serve to further the remedial purposes of the exclusionary rule. However, the United States Supreme Court has not interposed an exception where the reliance is upon an executive branch of the Government. Here, in essence, the official consulted for purposes of obtaining assistance in the search of the Verdugo residences were officials of the Mexican Federal Judicial Police. Notwithstanding Petitioner's previous comparison of Director Ventura as holding a position equal to that of the Director of the FBI, there is no authority which would even suggest that the Director's approval of a search in the United States would constitute a basis for non-application of the exclusionary rule.

Finally, extension of the good faith exception in this situation would encourage ignorance of the law as opposed to promoting understanding a full knowledge of the ramifications of DEA agents' actions. This end alone is sufficient to restrict application of the good faith exceptions to the situations contained in Krull and Leon.

A sufficient factual record was presented, which clearly undermines any determination of good faith reliance upon the actions of the foreign officials. First, it should be emphasized that Judge Irving, in his written opinion, noted that it is doubtful that the DEA agent's belief in the lawfulness of the search, whether in good faith or not, could be consid-

ered reasonable. Noting the lack of effort to seek legal advise or authorization regarding the searches from the local U.S. Attorney's Office or the Department of Justice, the Court expressly found that Bowen's belief in the legality of the search was unreasonable under tne Leon standard.

It should be emphasized that one of the DEA agents, who accompanied Agent Bowen and the other DEA agents along with the Mexican Federal Judicial Police for the search, was a Mexican attorney. Ricardo Ramos went to law school in Mexico and was a licensed lawyer in the Republic of Mexico, familiar with the Mexican Constitution. In light of the express provisions of the Mexican Constitution, the Government cannot, in light of Ricardo Ramos' particularly unique knowledge of the law in Mexico, claim good faith ignorance of foreign law.

Secondly, it should be noted that depending upon whose testimony is accepted, the Commandante was initially reluctant, or at best, for purposes of the Government's analysis, the agent expected that the Commandante would be reluctant to conduct the search of the Mexicali and San Felipe residences. From this reluctance it easily can be inferred that the Commandante was not in a position of expressing his assurance that all provisions of the Mexican law would be met. In fact, nowhere in the record is there any testimony that any Mexican official ever expressed an opinion that the search was legal under Mexican law.

Third, the particular testimony utilized by Agent White as to the so-called "authorization" indicated merely that the actions on the part of the Mexican officials were merely an accommodation to rendering assistance in conducting the searches desired by the DEA. According to Walter White's testimony, this way there would be "less involvement for all." White was aware that Director Venture was merely authorizing the easiest method for conducting the search or rendering assistance. Ventura wanted as little to do with the search as possible, indicating that he did not want to talk to Commandante Salazar.

Fourth, it is apparent that there was no contact whatsoever with the Attorney General's Office seeking authorization or approval for the search. For some unexplained reasons, the efforts to contact Mexican officials immediately shifted to efforts to contact Director Ventura. Thus, it is not even clear that DEA Agent Walter White conformed to any prior procedures in contacting the appropriate officials.

Next, the agents conducting the search were expressly aware that the Commandante was "generally thought to be a corrupt official." This factor, also strongly suggests that disingenuousness of the Government's proposal that there was good faith reliance upon foreign officials' compliance with foreign law. More importantly, the record established that one of the individuals utilized for the kidnapping of Respondent Verdugo had in fact in the past been involved in

the kidnapping of other officials. Not only were the agents aware that the Commandante was a corrupt official, but also believed the Mexican Federal Judicial Police would do anything that the United States requested that they do, whether or not complying with foreign law. The actions of the Mexican Federal Judicial Police in kidnapping Respondent Verdugo were manifestly illegal under Mexican law in light of a Baja, California prosecutor's issuance of warrants for the arrest of the kidnapping agents.

Another significant factor in determining the lack of reasonableness is the extent of participation by the DEA in the conception, instigation and initiation of the search. The accommodation by the MFJP to the desires of the DEA officials again suggests that there cannot be any good faith reliance upon the actions of the MFJP to justify the basis in application of the exclusionary rule.

The circumstances of the conduct of the search itself also indicate the unreasonableness of their actions and the complete lack of good faith in the legality of their searches. Particularly, Petitioner seeks to ignore the fact that initially at the San Felipe residence, the DEA officials went to the wrong house.

The execution of the searches of the residence may also be examined from the standpoint of view as to the actions of the Mexican Federal Judicial Police in conducting the searches at the Mexicali residence.

It is clear that the Commandante and the Mexican Federal Judicial Police seized weapons, and the Commandante himself stole Respondent Verdugo's Grand Marquis automobile. While conducting the searches, the agents prepared no inventory, no return, and they took no precautions whatsoever for safekeeping any valuables contained within any of the residences.

Additionally, the agents were accompanied by MFJP Official Pancho Guttierez, who in fact the agents, as well as the Commandante, knew was a fugitive from justice in the United States. Finally, the most obvious factor relating to the lack of good faith by the agents was their concealment of one of their true purposes for going to the Mexicali residence, that is, to search for evidence relating to the murder of DEA Agent Enrique Camarena.

Lastly, the wholesale seizure of documents based upon the fact that the Commandante was tired was not objectively reasonable under any standard, Mexican or United States. The action was so arbitrary and reflective of the complete disinterest in the search by the Mexican officials that the agents could not have believed this action complied with Mexican law.

The total combination of circumstances attaching to the search of the residences mandate that the reliance by the U.S. officials upon any MFJP actions was misplaced and in bad faith. These same factors demon-

strate the objectively unreasonable nature of the search, even if a warrant was not required.

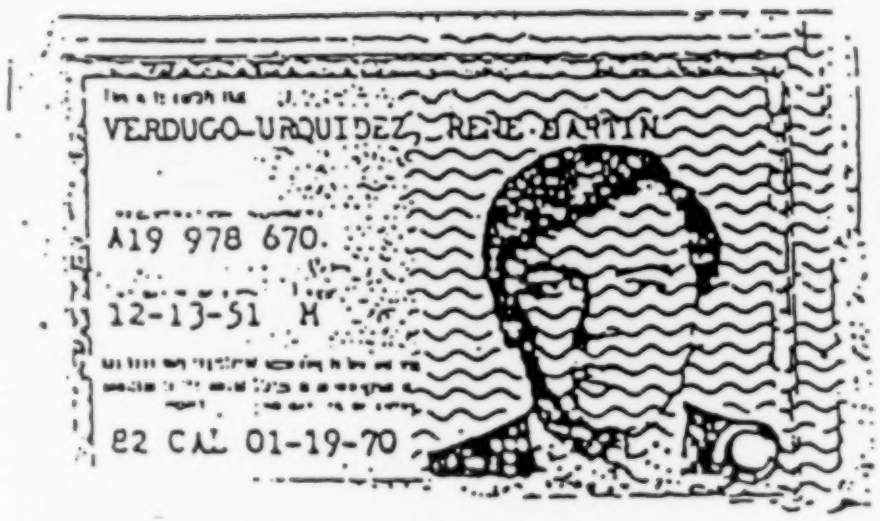
CONCLUSION

Respondent respectfully requests that this Court affirm the decision of the lower court.

DATED: September 5, 1989
MICHAEL PANCER

DATED: September 5, 1989
PATRICK Q. HALL

DATED: September 5, 1989
CHARLES L. GOLDBERG



Appendix A

CERTIFICATE OF SERVICE

I hereby certify that I am a member of the Bar of the United States Supreme Court and that on September __, 1989, I caused an original and forty copies of Respondent's Brief on the Merits to be mailed first class to the Clerk of the United States Supreme Court.

PATRICK Q. HALL

REPLY

BRIEF

Supreme Court, U.S.
FILED
SEP 13 1989
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No. 88-1353

In the Supreme Court of the United States

OCTOBER TERM, 1989

UNITED STATES OF AMERICA, PETITIONER

v.

RENE MARTIN VERDUGO-URQUIDEZ

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

KENNETH W. STARR
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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REPLY BRIEF FOR THE UNITED STATES

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1. At the outset, respondent defends the court of appeals' decision in this case, but not on its own terms. He notes (Br. 12-14) that at the conclusion of the Mexicali search Comandante Salazar placed the remaining documents in a briefcase and directed the DEA agents to complete their examination of those documents elsewhere. Respondent asserts that when, after returning to the United States, the agents opened the briefcase to complete their examination, without first securing a search warrant, they committed an independent violation of the Fourth

Amendment, wholly apart from the initial seizure in Mexicali. On that alternative basis, respondent urges the Court to "affirm the decision of the lower court" (Br. 12). That contention is meritless for three reasons.

First, respondent did not advance that alternative theory in the lower courts, and neither court addressed it. Respondent is not entitled to raise the issue for the first time in this Court. See *Granfinanciera, S.A.* v. *Nordberg*, 109 S. Ct. 2782, 2788-2789 (1989).

Second, respondent does not and cannot show that the tally sheet—which is the only document seized from respondent's residence that the government seeks to offer at trial (see Pet. App. 29a)—was one of the documents that Salazar placed in the briefcase. The lower courts made no such finding, and there is no evidence in the record to support such a finding.[1] Although respondent now claims, without citation to the record, that the tally sheet was contained in the briefcase (Br. 40), we note that in his court of appeals brief respondent contended that "it is not clear where the documents in question were seized" (C.A. Br. 11).

Finally, even if the tally sheet came from the briefcase, the Fourth Amendment would not prohibit the

[1] The evidence suggests just the opposite. The documents placed inside the briefcase at Salazar's direction were seized from "the back area of the house where there [were] some large cabinets with shelves" (10/23/86 Tr. 346). In a related prosecution of one of respondent's confederates, the government has adduced evidence showing that the tally sheet was found inside a briefcase in a closet just off the master bedroom in the Mexicali residence. See *United States* v. *Jones*, No. 86-0961, 6/11/87 Tr. 1239-1241.

agents from opening the briefcase upon their return to the United States. As the trial court found (Pet. App. 89a), Agent Bowen was already in the process of examining the remaining documents when Comandante Salazar placed them in the briefcase. And as this Court explained in *United States* v. *Jacobsen*, 466 U.S. 109, 117 (1984), "[t]he Fourth Amendment is implicated only if the authorities use information with respect to which the expectation of privacy has not already been frustrated." Merely inspecting documents that come into view during an earlier search does not constitute an independent search, "because it * * * produce[s] no additional invasion of respondent's privacy interest." *Arizona* v. *Hicks*, 480 U.S. 321, 325 (1987). Because the DEA agents had already seized the documents and had begun to examine them when Comandante Salazar placed them in the briefcase, the Fourth Amendment did not bar the agents from reopening the briefcase and completing the examination. Accordingly, if the initial seizure in Mexicali was lawful—and that is the question presented in this case—then the continued examination of the documents in the United States was lawful as well. See also *United States* v. *Felton*, 753 F.2d 256, 260-261 (3d Cir. 1985); *United States* v. *Morgan*, 744 F.2d 1215, 1219-1221 (6th Cir. 1984).[2]

[2] It is difficult, moreover, to understand how respondent could have a reasonable expectation of privacy in the briefcase sufficient to assert a Fourth Amendment interest. See *Rawlings* v. *Kentucky*, 448 U.S. 98 (1980); *Rakas* v. *Illinois*, 439 U.S. 128 (1978). The agents used the briefcase to secure certain of the evidence seized from respondent's home. Respondent has no greater privacy interest in the briefcase than he would in any other container selected by the government

2. On the merits, respondent disputes our contention that the applicability of a particular provision of the Constitution overseas depends upon the nature of the right, the territory in which the claim arises, and the relationship of the claimant to the American community.[3] See *Reid* v. *Covert*, 354 U.S. 1, 75 (1957)

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to secure seized evidence—for example, a vault in the United States Attorney's Office in which such evidence is ultimately stored.

[3] To shore up his connection to the United States, respondent asserts (Br. 3 n.2) that at the time of the searches in this case he was "a legal resident of the United States, Alien Registration Number A19-978-670." As far as we can tell, this is the first time that respondent has made any such claim; the lower courts made no such finding, and the dissent in the court below understood respondent to be a non-resident at all times pertinent to this case (Pet. App. 37a, 51a). Moreover, although respondent apparently received a green card in 1970 (see Resp. Br. App. A), there is nothing in the record to suggest that he has remained a resident alien since that time. Indeed, if the question is deemed material, we are prepared to prove on remand that at the time of his arrest respondent advised immigration officials that he had resided and worked in Mexico continuously since 1980.

Contrary to the amici's suggestion (Br. 12), we have *not* argued that Fourth Amendment protections apply only to *citizens*. See, *e.g.*, U.S. Br. 21-23, 24 n.15. Rather, we believe that in deciding whether to apply the Fourth Amendment, or any other constitutional provision, overseas, a court must consider, among other factors, "the extent to which the claimant maintains ongoing membership in the American community—whether by citizenship, naturalization, or continuous presence" (U.S. Br. 21). As we have noted (*id.* at 21-22), this Court made a similar point in *Johnson* v. *Eisentrager*, 339 U.S. 763 (1950)—a case that the amici do not address.

(Harlan, J., concurring).[4] Like the court of appeals (see Pet. App. 8a), respondent asserts that "[t]he Framers intended the Constitution's protection to apply to all individuals" (Br. 15).

The sources on which respondent relies offer no support for that view of the Constitution. Although the Declaration of Independence embraced the philosophy of natural rights, it sheds no light on the identity of those individuals who may invoke particular rights in American judicial proceedings. The preamble quoted from the Vermont Declaration of Rights (Resp. Br. 17) is not instructive at all, while Article XI of the Vermont Declaration, also relied on by respondent (Br. 17), simply employs the phrase "the people" without elaboration. Although respondent asserts that the Constitution "was drafted in universal language" (Br. 16), he does not explain why protections that were intended to "secure the

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[4] The amici contend (Br. 9 n.2) that this Court in *Kinsella* v. *United States ex rel. Singleton*, 361 U.S. 234 (1960), "rejected Justice Harlan's approach" to extraterritoriality questions. That is not so. In the *Singleton* case, the Court held that civilians accompanying military personnel overseas may not be subjected to court-martial trials for non-capital offenses. The Court thus extended the holding in *Reid* v. *Covert*, 354 U.S. 1 (1957), which involved a capital charge, to cases involving non-capital charges. The Court did not, however, "reject" Justice Harlan's approach to resolving whether, and to what extent, the Constitution applies abroad. To the contrary, the Court emphasized that the nature of the underlying right is central to the inquiry. As the Court explained, the Fifth and Sixth Amendments were applied overseas in *Reid* because those provisions "were 'all inclusive with their sweeping references to "no person" and to "all criminal prosecutions."'" 361 U.S. at 241 (quoting *Reid*, 354 U.S. at 7-8).

Blessings of Liberty to ourselves and our Posterity" (U.S. Const. Preamble) should be construed as a world-wide declaration of rights.[5]

More fundamentally, if the Constitution "appl[ies] to all individuals" (Resp. Br. 15), it follows that constitutional rights must be accorded to persons everywhere—including to persons who have no connection whatever to the United States. There is no basis for such a "universal" (*id.* at 16) approach to constitutional rights. To the contrary, "in extending constitutional protections beyond the citizenry, the Court has been at pains to point out that it was the alien's presence within its territorial jurisdiction that gave the Judiciary power to act." *Johnson* v. *Eisentrager*, 339 U.S. 763, 771 (1950).[6]

Quoting the *Reid* case, respondent contends that "'[t]he U.S. is entirely a creature of the Constitution'" and therefore "'can only act in accordance with all the limitations imposed by the Constitution'" (Br. 36, quoting *Reid*, 354 U.S. at 5). Respondent asserts that pursuant to this "enumerated powers doc-

[5] The passage respondent quotes (Br. 15-16) from *Yick Wo* v. *Hopkins*, 118 U.S. 356 (1886), states simply that the enforcement of rights conferred by the Fourteenth Amendment cannot be left to the unfettered discretion of government officials. The language does not reflect a "natural rights theme," and the case itself involved the application of Fourteenth Amendment principles to a purely domestic dispute.

[6] We do not dispute respondent's assertion (Br. 27) that "aliens within the United States enjoy a broad panoply of rights." But the cases cited by respondent for that proposition (Br. 27-30), and by the amici for a similar point (Br. 18-19), all involve *domestic* transactions. Respondent and his amici offer no support for the *extraterritorial* protection that they seek in this case.

trine," federal officials must "act within the proscriptions of the Constitution regardless of whether they act at home or abroad" (Br. 35). See also Amici Br. 8, 25. But that merely reformulates the question presented. Simply to say that federal officials may not ignore the Constitution when they act abroad does not answer the question whether the Fourth Amendment places substantive limitations on the officials' authority to execute the laws overseas.

The amici (Br. 30-34) challenge our reliance on the *Insular Cases*, which held that the applicability of the Constitution depends on the territory in which the constitutional claim arises. The amici contend, first, that *Reid* rejected the *Insular Cases*. To be sure, the plurality in *Reid* refused to "expan[d]" (354 U.S. at 14) the reasoning in the *Insular Cases*, and it therefore rejected the contention that the Constitution is inapplicable to Americans overseas. The Court had no occasion, however, to consider the more limited proposition we have asserted—that the scope of extraterritorial protections depends, in part, on the relationship of the overseas territory to the United States.[7] Moreover, this Court has more recently cited the *Insular Cases* with apparent approval, in holding that the Fourth Amendment applies in Puerto Rico. *Torres* v. *Puerto Rico*, 442 U.S. 465, 468-469 (1979).

The amici also argue (Br. 31) that the *Insular Cases* have no bearing where the constitutional claim is made against "United States agents," rather than against "local territorial authorities." The cases do

[7] The *Reid* plurality appeared to acknowledge that distinction, explaining that the *Insular Cases* "involved territories which had only recently been conquered or acquired by the United States" and which had "entirely different cultures and customs from those of this country." 354 U.S. at 13.

not, however, turn on, or even highlight, that factor. Indeed, one of the leading *Insular Cases*, *Downes* v. *Bidwell*, 182 U.S. 244 (1901), involved a claim that United States officials had unconstitutionally exacted an import tax on goods shipped from Puerto Rico.

Finally, the amici contend (Br. 32-34) that the reasoning in the *Insular Cases* applies only to territories in which the United States exercises a degree of sovereignty. They assert that the *Insular Cases* therefore do not apply where, as here, United States officials act within the territory of an independent sovereign. Paradoxically, under the amici's construction, the Constitution would afford *greater* protection in places in which the United States exercises no sovereignty at all. That cannot be so. The essence of sovereignty is the power to set the governing rules of law, "generally to the exclusion of other states." 1 Restatement (Third) of the Foreign Relations Law of the United States § 206 comment b, at 94 (1987). When the United States can act, if at all, only at the sufferance of the foreign state, it is hard to justify the extraterritorial application of American constitutional law.

3. When respondent and his amici turn from the Constitution in general to the Fourth Amendment in particular, they remain unable to justify their theory of wholesale extraterritorial application.

Neither respondent nor his amici deal adequately with the text of the Fourth Amendment. The amici first equate the phrase "the people" to "all persons" (Br. 10), but the Constitution does not use those phrases interchangeably, as is clear from a comparison of the text of the Fourth and Fifth Amendments. The amici characterize "the people" as nothing more than a grammatical solution to the otherwise "awk-

ward rhetorical redundancy" (Br. 12 n.4) of using the word "person" twice in the same sentence. That account is unpersuasive, however, because there were many other ways of avoiding the same "redundancy" without abandoning the reference to "the people." See, *e.g.*, Pennsylvania Declaration of Rights, Art. X (1776) ("That the people have a right to hold themselves, their houses, papers, and possessions free from search and seizure"); Vermont Const. (1777) (same). And even if, as respondent claims, the Constitution creates "inalienable rights" (Br. 19), that does not mean that all persons, regardless of their connection to the United States, enjoy the rights created.[8]

The amici next contend that because the Fourth Amendment applies to searches designed "to obtain evidence for a criminal prosecution," the Fourth Amendment protections must extend "to all people whom the United States has subjected to criminal prosecution" (Br. 13). That, however, has never been the rule under Fourth Amendment law. For example, although a search or seizure may lead to the prosecution of the occupant of an automobile, the occupant will not have a Fourth Amendment claim if he lacks an expectation of privacy in the vehicle. See *Rakas* v. *Illinois*, 439 U.S. 128 (1978). The pro-

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[8] The amici note (Br. 12 n.4) that freedom of speech under the First Amendment has been extended to resident aliens, even though that Amendment likewise refers to "the people." But in the First Amendment that term is used only in connection with the rights of assembly and petition. More importantly, the rights protected by the First Amendment are purely domestic. We know of no case in which the First Amendment has been accorded extraterritorial application. Cf. *Kleindienst* v. *Mandel*, 408 U.S. 753, 762 (1972).

tections of the Fourth Amendment thus do not extend to each and every person against whom a search or seizure "is directed" (Amici Br. 13).[9]

[9] The amici base their Fourth Amendment argument in part on their apparent belief that respondent "was indicted when the search took place" (Br. 14-15 n.5). Even if that consideration were relevant, it does not apply here, since respondent was indicted for the first time on January 29, 1986 (C.A. Excerpt of Record, at 69)—four days after the search. See Pet. App. 84a-85a.

The amici cite (Br. 37-39) a line of court of appeals' decisions that have applied the Fourth Amendment to overseas searches and seizures under the so-called "joint venture" doctrine. That doctrine recognizes that "fourth amendment principles do not apply to searches by foreign authorities in their own countries" unless "United States agents' participation in the investigation is so substantial that the action is a joint venture between United States and foreign officials" (*United States* v. *Peterson*, 812 F.2d 486, 490 (9th Cir. 1987). The cited cases provide only modest support for the amici's position here. Most of the cases rejected Fourth Amendment claims because United States officials were not significantly involved in the particular search or seizure. See, *e.g.*, *United States* v. *Rosenthal*, 793 F.2d 1214 (11th Cir. 1986), cert. denied, 480 U.S. 919 (1987); *United States* v. *Hawkins*, 661 F.2d 436 (5th Cir. 1981), cert. denied, 456 U.S. 991 (1982); *United States* v. *Rose*, 570 F.2d 1358 (9th Cir. 1978); *United States* v. *Marzano*, 537 F.2d 257 (7th Cir. 1976), cert. denied, 429 U.S. 1038 (1977); *United States* v. *Morrow*, 537 F.2d 120 (5th Cir. 1976); *Stonehill* v. *United States*, 405 F.2d 738 (9th Cir. 1968), cert. denied, 395 U.S. 960 (1969). We have no quarrel with that view; plainly, if a search is conducted principally by foreign officials, the Constitution cannot be implicated, even if the evidence obtained is later introduced at trial in the United States. The few cases that actually addressed the broader Fourth Amendment issue did so only in passing, and it is not clear whether the issue was contested in the litigation. See, *e.g.*, *United States* v. *Cadena*, 585 F.2d 1252, 1262 (5th Cir. 1978); *United States* v. *Toscanino*, 500 F.2d 267, 280-281 (2d Cir. 1974).

Respondent suggests (Br. 19-23) that the Equal Protection Clause of the Fourteenth Amendment requires that Fourth Amendment protections be extended to all persons, whoever and wherever they may be. The Fourteenth Amendment, of course, applies only to the States, and it therefore has no bearing here. See *Kinsella* v. *United States ex rel. Singleton*, 361 U.S. 234, 246 & n.11 (1960). Although the equal protection component of the Fifth Amendment's Due Process Clause applies to the federal government, see *Wayte* v. *United States*, 470 U.S. 598, 608 n.9 (1985); *Weinberger* v. *Weisenfeld*, 420 U.S. 636, 638 n.2 (1975); *Bolling* v. *Sharpe*, 347 U.S. 497, 499 (1954), that provision is equally irrelevant. The Fourth and Fifth Amendments were adopted the same year, and we know of no evidence that the Fifth Amendment in general, or its Due Process Clause in particular, was intended to prescribe the scope of the Fourth Amendment.

4. Finally, respondent and his amici contend that if the Fourth Amendment applies in this case, the search of respondent's Mexicali premises was constitutionally unreasonable.

a. Respondent advances an argument (Br. 37-41) that the court below did not address—that the warrantless search violated Article 16 of the Mexican Constitution and was therefore unreasonable under the Fourth Amendment.[10] Respondent does not ex-

[10] Article 16 of the Mexican Constitution provides, in pertinent part:

> No one shall be molested in his person, family, domicile, papers, or possessions except by virtue of a written order of the competent authority stating the legal grounds and justification for the action taken. * * * Every search warrant, which can be issued only by judi-

plain, however, why the standard of reasonableness under the Fourth Amendment should incorporate the constitutional law of the host country. To the contrary, as respondent's amici correctly note (Br. 47 n.17), "it is the Fourth Amendment's substantive standards, and not foreign law, which should give content to that restriction."

This Court made much the same point, in an analogous context, in *Cooper* v. *California*, 386 U.S. 58 (1967). In *Cooper*, the lower court had suppressed the evidence seized by police officers from a defendant's car after they had impounded the car following the defendant's arrest; the court reasoned that the officers had no authority under the state forfeiture statute to conduct the search. This Court rejected that conclusion, in language equally dispositive of respondent's reliance on the substantive law of Mexico (386 U.S. at 61):

> [T]he question here is not whether the search was authorized by state law. The question is rather whether the search was reasonable under the Fourth Amendment. Just as a search authorized by state law may be an unreasonable one under that amendment, so may a search not expressly authorized by state law be justified as a constitutionally reasonable one.

cial authority and which must be in writing, shall specify the place to be searched, the person or persons to be arrested, and the objects sought, the proceedings to be limited thereto, at the conclusion of which a detailed statement shall be drawn up in the presence of two witnesses proposed by the occupant of the place searched, or by the official making the search in his absence or should he refuse to do so.

Administrative officials may enter private homes for the sole purpose of ascertaining whether the sanitary and police regulations have been complied with, and may demand to be shown the books and documents required to prove compliance with fiscal rulings, in which latter cases they must abide by the provisions of the respective laws and be subject to the formalities prescribed for cases of search.

More generally, it is inconsistent with the purposes of the Fourth Amendment to base the content of reasonableness on the substantive law of a foreign state. The Fourth Amendment's command of reasonableness is, in large part, a command to police officers and other officials—who must conduct their searches and seizures within appropriate guidelines. Requiring agents to know of, and comply with, the niceties of foreign constitutional law would impose a standard that would often be inaccessible to agents and thus would not be responsive to the policies underlying the Fourth Amendment.[11]

To be sure, the agents cannot ignore the dictates of the host country. Whether, and to what extent, the agents have comported themselves in a reasonable manner will depend, in the first instance, on the demands imposed by the host country's officials. In the present case, for example, the DEA agents conformed to all of the requirements imposed by their foreign hosts, and conducted themselves in an entirely professional manner.[12] To go beyond that and re-

[11] The court of appeals in *United States* v. *Peterson*, 812 F.2d 486 (9th Cir. 1987), reached a similar conclusion, although it did so as a matter of exclusionary rule policy rather than as a matter of substantive Fourth Amendment law. See 812 F.2d at 491-492.

[12] Respondent challenges the reasonableness of the agents' efforts, suggesting (Br. 7-8) that Agent Bowen knew that

quire strict compliance with foreign constitutional law, would displace the Fourth Amendment's reasonableness standard in favor of a rule of exclusion that would depend on post hoc resolution of often obscure issues of foreign law.

Finally, and in any event, it is by no means certain that Article 16 of the Mexican Constitution would require a search warrant in this context. The district court made no such finding,[13] and the court of ap-

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Comandante Salazar was "corrupt." Respondent acknowledges (*id.* at 7) that Bowen denied knowing any such thing, but he contends that Bowen's testimony "was contradicted" by the testimony of Agents Maher and Martinez (*id.* at 7-8). The record does not bear out that contention. Agent Maher stated that, subsequent to the searches, he had "heard" that Salazar may have been involved in unlawful activity, but he testified that he had no first-hand knowledge of any such activity. 11/26/86 Tr. 678-679. He also stated that he could not recall with whom he had discussed the matter, although he thought it was "probably" one or more of the "agents in Calexico" (*id.* at 679). Agent Martinez likewise had heard that Salazar might be involved in corrupt activity, but he, too, could not recall with whom he had discussed the matter. Contrary to respondent's assertion (Br. 7-8), Martinez did not identify Agent Bowen as a participant in any such discussion; he simply included him as one of several agents with whom such a discussion might have taken place. 11/26/86 Tr. 713-714.

[13] The district court stated, simply, that "Article 16 of the Mexican Constitution seems to require, on its face, a warrant similar to that required by the Fourth Amendment before search of a residence is permissible" (Pet. App. 93a-94a). The court did not hold that, in the circumstances of this case, a warrant would in fact have been required under Mexican law.

peals did not address the issue at all. While respondent asserts that the Mexicali search was "plain[ly]" unlawful under Mexican law (Br. 38), we are unable confidently to draw any such conclusion. Although Article 16 requires the "written order of the competent authority" before a person's domicile may be searched, it also permits "administrative officials" to enter a private home in order to determine whether the "sanitary regulations" have been complied with. Narcotics trafficking in Mexico is proscribed not only by the Mexican penal laws, but also by the Mexican health code, pursuant to articles 234-243 of the General Health Law. It appears that Article 16 therefore authorizes officials to enter a home to uncover narcotics violations. If that reading is correct, the search of respondent's Mexicali home might have been entirely lawful under Mexican law. At a minimum, however, this issue of Mexican law is not at all obvious, even with an opportunity for subsequent research and reflection. The agents plainly could not be expected to reach a confident and correct resolution of the issue before engaging in a search on Mexican territory.

b. The amici dispute our contention that " 'special needs, beyond the normal need for law enforcement, make the warrant * * * requirement impracticable.' " *Griffin* v. *Wisconsin*, 483 U.S. 868, 873 (1987). In their view, Agent Bowen "could easily have applied for a warrant before his departure" (Br. 48). See also Resp. Br. 40. Amici do not identify, however, which magistrate the agents were expected to contact, nor do they cite any statute that vests magistrates (or any other public official) with the power to authorize an extraterritorial search. It is no

answer to suggest, as the amici do, that the government has an "obligation to provide a statutory mechanism" (Amici Br. 49 n.18). The fact that there is no such "mechanism" is not simply a congressional oversight; it is evidence that the Warrant Clause of the Fourth Amendment has never been regarded as applicable in this setting. And the amici's further complaint that "the government made no attempt even to obtain an order that probable cause existed" (*ibid.*) simply restates the question: if no magistrate had the authority to issue such an order and the Constitution did not require the agents to secure one, they can hardly be faulted for having failed to seek such an order.

The amici also insist that "a warrant in these circumstances would serve all the purposes of the Warrant Clause." Br. 51. For example, they contend, a search warrant would "define the scope of the search" because, in the amici's estimation, "foreign officials would have no interest in going beyond the dictates set forth in the warrant." Br. 52-53. In the present case, however, the Mexican officials seized several items that the DEA was not seeking; and it was Comandante Salazar, not Agent Bowen, who directed the search, including issuing the final order to seize the balance of the documents and to sort through them later. Pet. App. 87a-89a. Moreover, in a great many cases the host country's officials will have a separate basis for conducting the search or seizure; their agenda may not dovetail with that of the American agents. In such circumstances, as the amici appear to concede (Br. 52), an American warrant would not limit the scope of the search.

For the foregoing reasons, and for the reasons stated in our opening brief, the judgment of the court of appeals should be reversed.[14]

Respectfully submitted.

KENNETH W. STARR
Solicitor General

SEPTEMBER 1989

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[14] Respondent argues at length (Br. 41-50) that, in this context, there should be no good-faith exception to the exclusionary rule. Because we believe that there was no underlying violation of the Fourth Amendment, we have not addressed the appropriateness of an exclusionary remedy.

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AMICUS CURIAE

BRIEF

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No. 88-1353

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

UNITED STATES OF AMERICA,

Petitioner,

vs.

RENE MARTIN VERDUGO-URQUIDEZ,

Respondent.

On Writ of Certiorari to the United States Court of Appeal for the Ninth Circuit

BRIEF AMICUS CURIAE OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

KENT S. SCHEIDEGGER*
CHARLES L. HOBSON
Criminal Justice Legal Foundation
2131 L Street
Sacramento, California 95816
Telephone: (916) 446-0345

Attorneys for Amicus Curiae Criminal Justice Legal Foundation

* Attorney of Record

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BRIEF AMICUS CURIAE OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

SUMMARY OF FACTS AND CASE

Defendant is believed to be one of the leaders of a large and violent drug ring which smuggles large quantities of heroin, marijuana and cocaine from Mexico to the United States. Appendix to Petition for Certiorari: (App. Pet. Cert.) at 2a. The Drug Enforcement Agency (DEA) filed a sealed complaint against him in 1985 charging him with various violations of the criminal laws of the United States. *Id.*, at 3a. An arrest warrant was issued by the United States District Court for the Southern District of California based upon this complaint. *Ibid.* The DEA attempted to arrest defendant during one of his many trips to the United States, but could not find him in this country. *Ibid.*

After determining that defendant lived in Mexicali, Mexico, the DEA asked the United States Marshals Service to determine if defendant could be apprehended in Mexico by Mexican authorities and taken to the United States for trial. *Ibid.* Mexican authorities informed the marshals that defendant could be arrested by Mexican officers in Mexico if there was an outstanding warrant for his arrest in the United States, which the marshals showed to the Mexican authorities. *Id.*, at 3a-4a. Subsequently, defendant was arrested and delivered to the marshals at the border by the Mexican police. *Id.*, at 4a. The six Mexican officers who arrested defendant were reported to have received death threats against themselves and their families. The officers have been formally charged with kidnapping by the prosecutor in Baja California and now reside in the United States. *Id.*, at 4a, n. 1.

After the DEA took custody of defendant, the DEA sought the Mexican government's permission to search defendant's Mexicali residence. *Id.*, at 5a, n. 2. After receiving authorization from the Director General of the Mexican Federal Judicial Police (MFJP) and the MFJP commandante in Mexicali, four DEA officers and between ten and fifteen MFJP officers conducted searches of defendant's Mexicali and San Felipe residences. *Id.*, at 27a-28a. As a result of the search, the DEA obtained a tally sheet which the United States attempted to introduce as evidence of the quantities of marijuana smuggled by defendant to the United States. *Id.*, at 29a-30a. The district court suppressed this evidence. *Id.*, at 2a. The Ninth Circuit Court of Appeals upheld the suppression, finding the searches to be a violation of defendant's Fourth Amendment rights. *Ibid.*

SUMMARY OF ARGUMENT

An alien's protection under the Constitution is dependent upon his relation to the United States. Defendant's Mexicali house bears no relation to the United States or defendant's presence in the United States to justify protecting the house under the Fourth Amendment.

Subjecting the Mexicali search to the Fourth Amendment also constitutes an unwarranted extension of the Fourth Amendment into foreign affairs. The Constitution, while it does apply to aliens within the United States and to citizens abroad, does not apply to non-citizens outside the United States.

Subjecting the search to the Fourth Amendment is both bad policy and bad constitutional law. It is bad law because it infringes upon the primacy of the executive in its conduct of foreign affairs. It is bad policy as it places the judiciary in an area outside of its traditional expertise — foreign affairs.

Finally, the exclusionary rule should not apply to this foreign search. The exclusionary rule, being primarily a deterrent to illegal searches, should be applied only to those situations where the societal costs of exclusion are outweighed by the benefits derived from it. Here, given the lessened privacy interest which our society has in an alien's foreign domicile, the lower deterrent effect the exclusionary rule has over foreign searches, and the higher costs of applying the exclusionary rule internationally, the exclusionary rule should not apply to searches of alien's foreign residences.[1]

1 An additional argument is that even if the Fourth Amendment reasonableness requirement applies, the requirement for a United States warrant does no... This issue is not discussed in this amicus brief because we understand that it will be a central topic of the Solicitor General's brief.

ARGUMENT

I. Defendant's Mexican residence was not protected by the Fourth Amendment.

A. The Constitution and Aliens

> "[A]ny policy towards aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference." *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 588-589 (1952) (footnote omitted). Accord, *Mathews* v. *Diaz*, 426 U.S. 67, 81, n. 17 (1976); *Kleindienst* v. *Mandel*, 408 U.S. 753, 765-767 (1972).

If the political branches have this much discretion regarding the disposition of aliens within the United States, then the executive and legislative branches must have virtually unlimited powers in dealing with aliens outside the territorial jurisdiction of the United States. Yet the court below decided that a Mexican national's Mexican residence is protected by the Fourth Amendment to the United States Constitution. App. Pet. Cert. at 23a. The Ninth Circuit is attempting to extend the Constitution where it has never reached — to actions outside the United States taken against an alien.

This court has long recognized that an alien's rights under the Constitution depend upon his relationship to the United States. As Justice Jackson stated in *Johnson* v. *Eisentrager*, 339 U.S. 763, 770 (1950), "[t]he alien, to whom the United States has been traditionally hospitable, has been accorded a generous and ascending scale of rights as he increases his identity with our society." As the alien approaches citizenship his rights become greater until he achieves the full rights of citizenship upon naturalization. *Ibid.* However, until he becomes a citizen, the federal government can and does draw distinctions between a

citizen and an alien in the possession of rights and distribution of benefits. *Mathews* v. *Diaz*, 426 U.S. 67, 78, n. 12 (1976).[2]

The distinction between citizen and alien is paralleled by the distinction between different types of aliens. As Congress has drawn many distinctions between aliens, *id.*, at 78-79, n. 13, this Court has drawn distinctions between aliens ranging from the virtually rightless enemy aliens, *Johnson*, 339 U.S., at 771-772, to the substantial rights of legal resident aliens. See *Hampton* v. *Mow Sung Wong*, 426 U.S. 88, 116 (1976). What justifies the differences in the treatment of aliens is the relationship the alien has to the United States. As the *Johnson* court recognized, the more the alien has in common with the United States, symbolized by his closeness to naturalization, the greater his identity with the United States and therefore the more deserving he is of constitutional rights.

A number of cases have delineated the rights of illegal aliens. An illegal alien is protected under the Fifth Amendment from deprivation of life, liberty or property without due process of law. *Wong Yang Sung* v. *McGrath*, 339 U.S. 33, 49-50 (1950). Illegal aliens are also protected under the equal protection clause of the Fourteenth Amendment. *Plyler* v. *Doe*, 457 U.S. 202, 210 (1982).

These rights are derived from the alien's presence within the United States. "These provisions are universal in their application *to all persons within the territorial jurisdiction*, without any regard to any differences of race, of color, or of nationality...." *Yick Wo* v. *Hopkins*, 118 U.S. 356, 369 (1885) (emphasis added).

2 The *Mathews* court noted that the Constitution itself explicitly makes a distinction between citizens and aliens, giving only citizens the protection of their privileges and immunities and the right to vote, limiting membership in the House of Representatives and Senate to citizens for seven and nine years respectively, and limiting the Presidency to "natural born citizen[s]." *Ibid.*

The *Johnson* court recognized that this stood for the principle that "in extending constitutional protection beyond the citizenry, ... it was the alien's presence within its territorial jurisdiction that gave the Judiciary the power to act." 339 U.S., at 771.

The illegal alien's "identity with our society," see *id.*, at 770, is not complete, however. The federal government has chosen to exclude illegal aliens from this country. The United States can do this because it possesses the sovereign prerogative to exclude or admit aliens from admission to this country. See, *e.g.*, *Landon* v. *Plasencia*, 459 U.S. 21, 32 (1982).

The illegal alien is not permitted to work within the United States, and his employer is civilly and criminally liable for knowingly hiring or retaining him. 8 U.S.C. § 1324a. Furthermore, while the continuously present permanent resident alien is guaranteed due process when threatened with deportation, see *Landon*, 459 U.S., at 33, the illegal alien is only entitled to a "fair hearing upon threat of deportation." See *id.*, at 32. While the states are generally incapable of classifying different types of aliens, *Plyler* v. *Doe*, 457 U.S., at 225, the federal government can treat illegal aliens differently from other types of aliens. See *id.*, at 219, n. 19.

The disabilities an illegal alien has under the Constitution are derived from Congress's exclusion of him from this country. Congress, by exercising the inherent power of sovereignty and its own power under the Constitution, art. I, § 8, cl. 4, has distinguished between the illegal alien and the alien admitted as a lawful resident, depriving the illegal alien of rights under the Constitution which are granted to the resident alien. Thus, it is the illegal alien's relation to the United States that determines the scope of his Constitutional rights.

The best way to determine defendant's relation to the United States is to analyze why he is here. Defendant is here solely so that he can be prosecuted for committing various federal crimes. App. Pet. Cert. at 39. He is not here because he has been

determined to be the kind of person our country wishes to admit for residence. Indeed, he will doubtless be deported when and if he is ever released from prison. Thus, he is entitled to those rights which follow from mere presence, but not those which come from being a member of our society.

The Fourth Amendment does protect aliens inside the United States from unreasonable searches conducted within the United States. In *INS* v. *Lopez-Mendoza*, 468 U.S. 1032 (1984), all of the opinions imply that an unreasonable search of an illegal alien within the United States would be a Fourth Amendment violation. See *id.*, at 1050 (majority); *id.*, at 1051 (Brennan, J., dissenting); *id.*, at 1055 (White, J., dissenting); *id.*, at 1060 (Marshall, J., dissenting). Like his other constitutional rights, defendant's Fourth Amendment rights are derived from his presence within the United States. See *Johnson* v. *Eisentrager*, 339 U.S., at 71; *Landon* v. *Plasencia*, 459 U.S., at 32. Therefore any search made on defendant's person while he is in the United States would be subject to the requirements of the Fourth Amendment. Similarly any of defendant's possessions or property will be protected by the Fourth Amendment so long as they are within the territorial jurisdiction of the United States. It does not follow, however, that mere presence within the United States extends Fourth Amendment protection worldwide to all of the possessions of a person who would otherwise have no Fourth Amendment rights at all.

B. The Constitution and the Water's Edge

The general rule is that outside the boundaries of the United States our government is completely unrestricted by constitutional limitations. *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936). The primary, if not the only, exception is for citizens abroad.

In *Reid* v. *Covert*, 354 U.S. 1 (1957), two civilians had been convicted by court-martial for killing their servicemen husbands on overseas military bases. They challenged the constitutionality

of such trials on the ground that their Fifth and Sixth Amendment rights had been violated. The Court rejected the contention that the Bill of Rights was inapplicable.

Justice Black's plurality opinion[3] is based squarely on the citizenship of the defendants. "At the beginning we reject the idea that when the United States acts against *citizens* abroad it can do so free of the Bill of Rights." *Id.*, at 5 (italics added).

The *Reid* plurality cites the court of appeal opinion in *Eisentrager* for the proposition that the Constitution limits government actions abroad and then refers to the Supreme Court opinion as reversing "on other grounds." *Reid*, 354 U.S., at 8, n. 10.[4] The "other grounds" were that Eisentrager was not a citizen. *Johnson* v. *Eisentrager*, 339 U.S. 763, 785 (1950). *Reid* clearly does not support the proposition that an action on foreign soil against an alien who happens to be in the United States at the time is limited by the Bill of Rights.

In the present case, the Ninth Circuit combined two unremarkable propositions to reach a remarkable result. It is true that the Fourth Amendment limits government action abroad. See App. Pet. Cert. at 7a. It is also true that aliens in defendant's position have *some* Fourth Amendment rights. See App. Pet. Cert. at 9a and *supra*, at 7. It does not follow, though, that defendant has the full extent of Fourth Amendment rights which citizens possess. The power to limit the actions of the United

3 This opinion can now be fairly stated to be the law. The position taken by Justices Harlan and Frankfurter was rejected in *Kinsella* v. *United States*, 361 U.S. 234 (1960).

4 *Eisentrager* is discussed in part I A, *supra*, at 4-7.

States government beyond our borders is a dangerous one, for the reasons discussed in part II C, *infra*. It should not be conferred lightly. Mere physical presence in the United States is not enough.[5]

C. The Judiciary and Foreign Affairs

Extension of the Fourth Amendment to foreign searches of the property of aliens would entangle the judiciary in foreign affairs. *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936) made clear the primacy of the Executive branch in conducting foreign affairs. The Court, in addition to finding that the federal power over external affairs is essentially different from its internal powers, found that participation in the exercise of the external power by other branches is significantly limited. *Curtiss-Wright*, 299 U.S., at 319. A nation must have a supreme will exercising sovereignty to endure. *Id.*, at 316-317. The President is the embodiment of that supreme will. "In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation." *Id.*, at 319.

Thus, it is the President and the executive branch who should conduct the affairs of the United States outside its borders. While *Curtiss-Wright* dealt with the delegation of power from Congress to the President, its analysis of the President's role in foreign affairs applies to the entire federal system.

> "Moreover, he [the President], not Congress, has the better opportunity of knowing the conditions which prevail in foreign countries.... He has his confidential sources of information. He has his agents in the form

5 The question of whether a legal permanent resident alien has sufficient Fourth Amendment rights to limit an overseas search need not be addressed in this case.

> of diplomatic, consular and other officials. Secrecy in respect of information gathered by them may be highly necessary, and the premature disclosure of it productive of harmful results." *Id.*, at 320.

This analysis applies with even greater force to the relationship between the judiciary and the President. If Congress, which possesses large, well-staffed committees on the conduct of foreign affairs, is less capable of conducting foreign relations than the President, then the judiciary must be even less competent when crossing America's borders. Courts should be doubly careful when intruding upon the executive branch's conduct of foreign relations. The judiciary, with no particular expertise in foreign affairs, cannot act outside the territorial jurisdiction of the United States and can only act on a matter when it involves a case or controversy brought before it. U.S. Const., art. III, § 2. The judiciary is unquestionably the least competent of the three branches to conduct foreign policy.

This Court has recognized its disability in foreign affairs in its refusal to adjudicate most issues that come before it concerning foreign policy, labeling them "political questions."

> "The conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative — 'the political' — Departments of the Government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision." *Oetjen* v. *Central Leather Company*, 246 U.S. 297, 302 (1918).

A similar rationale was applied to the United States's policy towards aliens in *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 588-589 (1952) and in *Mathews* v. *Diaz*, 426 U.S. 67, 81 (1976).

While the *Curtiss-Wright* court did not specifically address the relationship between the executive and the judiciary, a clear deference to the executive can be inferred from the Court's opinion. Only the Constitution gives the judiciary the power to conduct judicial review. If an act by either of the other branches

does not violate the Constitution, then the judiciary cannot review its validity. Cf. *Marbury* v. *Madison*, 1 Cranch. (5 U.S.) 137, 177-178 (1803). As the Constitution does not limit the executive in foreign matters not concerning United States citizens, the judiciary has no power to conduct judicial review over such acts of the government.

The primacy of the President in foreign affairs has been confirmed by the Court on other occasions. In *Johnson* v. *Eisentrager*, 339 U.S. 763, 789 (1950), the court affirmed the primacy of the executive in foreign policy, finding the President "exclusively responsible" for the conduct of foreign policy, citing *Curtiss-Wright*. *First National Bank* v. *Banco National De Cuba*, 406 U.S. 759 (1972) recognized the long record of deference the Court paid to the Presidency in the conduct of foreign policy. "[T]his Court has recognized the primacy of the Executive in the conduct of foreign relations ... emphatically...." *Id.*, at 767 (plurality opinion). The *Curtiss-Wright* view was reiterated in *United States* v. *Belmont*, 301 U.S. 324, 330 (1937): "Governmental power over external affairs is not distributed, but is vested exclusively in the national government. And in respect of what was done here, the Executive had authority to speak as the sole organ of that government."

Defendant is not a United States citizen and the search of his residence occurred outside of the territorial jurisdiction of the United States. App. Pet. Cert. at 2a. Therefore, the search was an act of the executive branch in the conduct of foreign policy, and the lower courts should have been more cautious in their decision to exercise judicial review in light of the judiciary's lack of competence in foreign affairs.

The search in this case involved extensive negotiation between the Mexican authorities and the DEA. App. Pet. Cert. at 26a-28a. The DEA officers did not act until the Mexican authorities assented to the search. *Id.*, at 27a-28a. The entire search was conducted under the supervision, and with the help, of the Mexican government. *Id.*, at 28a-29a. The Mexican authorities

kept certain items found by DEA in the course of the search and gave to the DEA several items found during the search. *Id.*, at 29a. The search was related to a particularly heinous crime. See *id.*, at 2a-3a. The search and arrest itself also led to tension between the United States and Mexico. See *id.*, at 4a, n. 1.

This case involves much more than a typical search and seizure. It is a prime example of the United States exercising its sovereign power in dealing with a foreign government. As we fight to stop the flow of drugs into this country, actions like this one become a vital part of the sovereign power of the United States and should be respected as such by the judiciary.

The court of appeals's decision subjecting the United States to the warrant requirement when it searched defendant's Mexicali residence, *id.*, at 36a, is the type of judicial interference which tnreatens the primacy of the executive branch in foreign affairs. Foreign searches conducted by agents of the federal government will generally need to involve negotiation and cooperation with the foreign sovereign. Unless the United States wishes to violate the law of the foreign state,[6] it will have to get permission from the foreign state to conduct the search, and will have to acquiesce to the demands of the foreign state in conducting the search.

The judiciary, in subjecting the United States to the warrant requirement, interferes with the relationship between the United States and the foreign sovereign. The warrant that the Ninth Circuit would require would be a dead letter in Mexico or any other foreign nation. *Id.*, at 35a. A search warrant, by

6 The executive may, in extreme circumstances, decide to violate the foreign law, possibly committing an act of war. The judiciary has consistently refused to review such decisions. See, *e.g.*, *Massachusetts* v. *Laird*, 400 U.S. 886 (1970), refusing leave to file an original action to challenge the legality of the Vietnam War.

limiting the place, object, and time of the search, U.S. Const., amend. IV (place to be searched and what to be seized); *Sgro* v. *United States*, 287 U.S. 206, 210-211 (1932) (time limit), can hinder the United States in its negotiations with foreign officials. Not every nation has a warrant requirement. See 1 LaFave, *Search and Seizure* § 1.8(g) at 214 (2d ed. 1987); Note, 2 N.Y.U.J. Int'l L. & Pol. 280, 310 (1969). Furthermore, domestic and international politics may require the search to be conducted upon very short notice, preventing United States officials from timely obtaining search warrants. All of this requires flexibility and intimate cooperation between American and foreign officials. Having a United States magistrate looking over his shoulder will make an American official's task much more difficult.

Defendant, a Mexican national, should not look to the District Court for the Central District of California to protect his Mexicali residence. His house is on Mexican soil and he is a Mexican citizen. Therefore it is up to the government of Mexico, not an American court, to protect him. Mexico, by exercising its sovereignty over its territory and its citizens is best able to protect him from the government of the United States. Mexico controls its territory and, through this control, has the ultimate say over the timing and the manner of the search. The only thing a federal court can do is issue a piece of paper which is worthless in the country of the search. The district court order suppressing the fruits of the search applied a constitutional provision that did not apply to this search, hamstrung the authority of the executive branch in its conduct of foreign policy, and usurped Mexico as the rightful protector of the defendant.

II. The exclusionary rule should not apply to the fruits of foreign searches of aliens.

While the search in question was not a violation of the Fourth Amendment,[7] this case can be resolved without reaching this substantive question. Instead, this Court can simply decline to apply the exclusionary rule to searches of this type. See *Illinois* v. *Gates*, 462 U.S. 213, 223 (1983).

For the exclusionary rule to apply to a search, its deterrent value must outweigh the societal cost of the exclusion of evidence. *United States* v. *Janis*, 428 U.S. 433, 453-454 (1976). While other reasons have been given to support the exclusionary rule, namely "the imperative of judicial integrity" that courts should not be "accomplices in the willful disobedience of a Constitution they are sworn to uphold," *Elkins* v. *United States*, 364 U.S. 206, 222-223 (1960), deterring unlawful searches by the police is still the primary purpose of the exclusionary rule. "The primary justification for the exclusionary rule then is the deterrence of police conduct that violates Fourth Amendment rights." *Stone* v. *Powell*, 428 U.S. 465, 486 (1976). "While courts, of course, must ever be concerned with preserving the integrity of the judicial process, this concern has limited force as a justification for the exclusion of highly probative evidence." *Id.*, at 485. The deterrence role of the exclusionary rule has a long history. See *Elkins* v. *United States*, 364 U.S., at 217; *Mapp* v. *Ohio*, 367 U.S. 643, 656 (1961); *Linkletter* v. *Walker*, 381 U.S. 618, 636-637 (1965); *Terry* v. *Ohio*, 392 U.S. 1, 13 (1968). It has played a very prominent role in the Court's more recent exclusionary rule analysis. See *INS* v. *Lopez-Mendoza*, 468 U.S. 1032, 1041 (1984); *United States* v. *Leon*, 468 U.S. 897, 906 (1984).

7 See part I, *supra*, at 4-13.

While the exclusionary rule has traditionally been viewed as the primary deterrent to police abuse of the Fourth Amendment, its use does not come without costs. The exclusionary rule excludes evidence that is typically highly relevant to the defendant's guilt for no reason other than that the police violated the Fourth Amendment in securing the evidence. As Judge Cardozo said, "The criminal is to go free because the constable has blundered." *People* v. *Defore*, 242 N.Y. 13, 21, 150 N.E. 585, 587 (N.Y. 1926). This court has long recognized the high cost of applying the exclusionary rule.[8]

> "Application of the rule thus deflects the truthfinding process and often frees the guilty. This disparity in particular cases between the error committed by the police officer and the windfall afforded a guilty defendant by application of the rule is contrary to the idea of proportionality that is essential to the concept of justice. Thus, although the rule is thought to deter unlawful police activity in part through nurturing of respect for Fourth Amendment values, if applied indiscriminately it may well have the opposite effect of generating disrespect for the law and administration of justice." *Stone* v. *Powell*, 428 U.S., at 490-491 (footnotes omitted).

This Court has recognized the high cost of the exclusionary rule many other times. See, *e.g.*, *Rakas* v. *Illinois*, 439 U.S. 128,

8 A somewhat lengthier critique of the cost of the exclusionary rule goes as follows: "Titus, you have been found guilty of conducting a lottery; Flavius, you have confessedly violated the constitution. Titus ought to suffer imprisonment for crime, and Flavius for contempt. But no! We shall let you *both* go free. We shall not punish Flavius directly, but shall do so by reversing Titus' conviction. This is our way of teaching people like Flavius to behave, and of teaching people like Titus to behave, and incidentally of securing respect for the Constitution. Our way of upholding the Constitution is not to strike at the man who breaks it, but to let off somebody else who broke something else." 8 Wigmore, *Evidence* § 2184a, at 31, n. 1 (McNaughton rev. 1961).

137-138 (1978); *United States* v. *Ceccolini*, 435 U.S. 268, 275 (1978); *United States* v. *Calandra*, 414 U.S. 338, 348 (1974).

Thus, when deciding whether to apply the exclusionary rule, courts must balance "the benefits of deterring police misconduct against the costs of excluding reliable evidence of criminal activity." *California* v. *Greenwood*, 108 S.Ct. 1625, 1631, 100 L.Ed.2d 30, 39 (1988). In the typical warrantless search case the balance between costs and benefits of the exclusionary rule has to date been resolved in favor of excluding the evidence at the trial level. However, the balance is close and any meaningful increase in costs or decrease in benefits would justify not applying the rule.

This Court has been unwilling to extend the rule to benefit persons other than the victims of the unlawful search, *United States* v. *Salvucci*, 448 U.S. 83, 85 (1980); to grand jury hearings, *United States* v. *Calandra*, 414 U.S., at 351; to civil suits by a different sovereign, *United States* v. *Janis*, 428 U.S., at 459; to deportation hearings, *INS* v. *Lopez-Mendoza*, 468 U.S., at 1043-1045; and to situations in which the police relied in good faith on a defective warrant, *United States* v. *Leon*, 468 U.S., at 922. In these cases the higher costs or lower benefits tipped the balance against application of the exclusionary rule. The question, then, is whether extending the exclusionary rule to the foreign search of an alien's residence alters the balance justifying the exclusionary rule.

The DEA's search of defendant's Mexicali residence is not a garden variety warrantless search which would merit automatic application of the exclusionary rule. Defendant is a Mexican national, and the search took place outside the United States. Applying the exclusionary rule to this type of search could have

a seriously adverse effect on the conduct of United States foreign relations and seriously hamper the ability of United States agents to conduct foreign searches.[9]

Searches in foreign nations are less likely to be deterred than domestic searches. When conducting a search in a foreign country the United States must follow the dictates of the host government. If it does not play by the host's rules, then the host can either exercise its sovereign power to prevent the United States from conducting the search, or it can take other actions to deter the United States as it sees fit. While the United States may initiate and play a significant part in the planning and execution of foreign searches, the host sovereign still controls the search. See 1 LaFave, *Search and Seizure* § 1.8(g) at 217 (2d ed. 1987). Therefore, the host state is responsible for the manner in which the search is executed. Thus the "police" who are to be deterred by the exclusionary rule are those of the government of the nation in which the search is conducted. While the host nation may want to see a successful American prosecution of its citizens, the success of the prosecution is of no real interest to the host nation. As the interest of the controlling party in the constitutionality of the search is less than in the standard domestic search, the exclusionary rule must have less of a deterrent effect than it will in the standard domestic search. See *United States* v. *Rosenthal*, 793 F.2d 1214, 1230 (11th Cir. 1986).

Given the higher costs and lessened benefits of applying the exclusionary rule, it should not be applied to foreign searches of an alien's residence. Given the close balance that already exists between the societal costs and benefits of applying the exclusionary rule in an ordinary search, the rule should not apply if there is any significant increase in cost or decrease in benefit under the circumstance of this case. Here, the extra costs in interference

9 See part I C, *supra*, at 9-13.

with foreign relations and in the ability of the United States to conduct foreign searches are a substantial increase of costs in applying the exclusionary rule to foreign searches. Furthermore, given the problems in deterring foreign searches that would not comply with domestic standards, the benefits of applying the exclusionary rule are lower than in the standard search. As there are no available sources to mitigate this increase in costs and decrease in benefits, the balance is decisively shifted.

Finally, the exclusionary rule should not apply because society's interest in defendant's Mexicali home does not justify the cost of extending the exclusionary rule. "The purpose of the Fourth Amendment is to prevent unreasonable governmental intrusions into the privacy of one's person, house, papers, or effects. The wrong condemned is the unjustified governmental invasion of these areas of an individual's life." *Calandra*, 414 U.S., at 354. The privacy interest protected by the Fourth Amendment is not derived from the unadorned subjective preferences of the individual searched, but instead is derived from those expectations of privacy that society finds reasonable. *Greenwood*, 100 L.Ed.2d, at 36, 108 S.Ct., at 1628. Thus, Fourth Amendment analysis turns on such factors as society's interest in keeping certain areas free from government intrusion. *Id.*, 100 L.Ed.2d at 39, 108 S.Ct. at 1630.

The United States society's interest in maintaining the privacy of defendant's Mexicali home has to be relatively low. The Fourth Amendment is based upon the principle "that a man's house is his castle." *Weeks* v. *United States*, 232 U.S. 383, 390 (1914). While a New Yorker's apartment or a Texan's ranch may be a "castle" under the Fourth Amendment, our country does not have the same interest in preserving the privacy of a Mexican national's house in Mexico. Our society is made up of those who reside permanently in the United States and does not have a great interest in preserving the privacy of a house outside of society, owned by someone not a member of our society. Given the precarious balance between the costs and benefits to society in the application of the exclusionary rule, society's lessened privacy

interest in defendant's Mexicali home merits the withdrawal of this type of search from the reach of exclusionary rule. American courts should not protect defendant's property. It is up to the Mexican government to protect defendant's interest in privacy in his Mexicali residence.

Whatever the Court may decide on the substantive Fourth Amendment question, the exclusionary rule should not have been applied to defendant's search.

CONCLUSION

The decision of the Ninth Circuit should be reversed.

Dated: May, 1989

Respectfully submitted,

KENT S. SCHEIDEGGER*
CHARLES L. HOBSON

Attorneys for Amicus Curiae
Criminal Justice Legal Foundation

*Attorney of Record

AMICUS CURIAE

BRIEF

No. 88 - 1353

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

UNITED STATES OF AMERICA,
Petitioner,
vs.
RENE MARTIN VERDUGO-URQUIDEZ
Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION, ACLU OF SOUTHERN CALIFORNIA, ACLU OF SAN DIEGO AND IMPERIAL COUNTIES, AND CENTER FOR CONSTITUTIONAL RIGHTS IN SUPPORT OF RESPONDENT

PAUL L. HOFFMAN
JOHN W. HEILMAN
ACLU FOUNDATION
OF SO. CALIFORNIA
633 South Shatto Place
Los Angeles, California 90005
(213) 487-1720

JOHN A. POWELL
NINA PILLARD
AMERICAN CIVIL
LIBERTIES UNION
132 West 43rd Street
New York, New York 10036
(212) 944-9800

DAVID D. COLE*
CENTER FOR
CONSTITUTIONAL RIGHTS
666 Broadway
New York, New York 10012
(212) 614-6464

BETTY WHEELER
ACLU FOUNDATION
OF SAN DIEGO AND
IMPERIAL COUNTIES
1202 Kettner Boulevard,
Suite 6200
San Diego, California 92101
(619) 232-2121

Attorneys for Amicus Curiae

*Counsel of Record

Lawyers Brief Service / Legal Printers / (213) 383-4457 / (714) 720-1510

QUESTION PRESENTED

1. Whether a foreign national, arrested in his own country, at the request of United States officials delivered to the United States for criminal prosecution, and charged and detained here under United States law, is protected by the Fourth Amendment when United States authorities subsequently institute a warrantless search of his residence abroad.

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INTERESTS OF AMICI

Amici, The American Civil Liberties Union, two of its California affiliates, and The Center for Constitutional Rights, are non-profit public interest legal organizations dedicated to protecting the civil rights and civil liberties of all persons in the United States. The organizations' interest in this case is in ensuring that federal officials are restricted by the Bill of Rights whenever such officials take action against persons within the United States.

STATEMENT OF THE CASE

Amici adopt the respondents' statement of facts, and emphasize two facts critical to resolution of this case.

First, respondent Rene Martin Verdugo-Urquidez was, at the time of the search at issue, lawfully present in the United States. Indeed, the government gave him

no choice in the matter. United States government officials arranged to have him arrested by Mexican authorities in Mexico, on the strength of a warrant issued in this country for violations of United States laws. The Mexican authorities delivered him to United States agents at the border, where officers of the Drug Enforcement Agency (DEA) took custody of him. He was and is incarcerated in Metropolitan Correction Center in San Diego, California. The search at issue here was conducted after Mr. Verdugo-Urquidez's indictment and arrest, while he was detained in San Diego.

Thus, this case does not involve the rights of "nonresident aliens," as both the court of appeals and the petitioners suggest. United States v. Verdugo-Urquidez, 856 F.2d 1214, 1218 (9th Cir. 1988); Pet. Br. 6-7. Rather, it involves

the constitutional rights of a foreign national lawfully residing here, and facing prosecution here for violation of United States laws.

Second, the search at issue was conducted at the initiation, and under the direction and control of, a United States DEA agent, not by foreign agents for enforcement of foreign law. Indeed, the government admits that the search was conducted for the sole purpose of obtaining evidence to use against Mr. Verdugo-Urquidez in the criminal prosecution for which he was arrested and detained. Pet. Br. 2-3.

SUMMARY OF ARGUMENT

The question posed in this case is much narrower than either the court of appeals or the United States has framed it. This case does not require the Court to determine whether "nonresident aliens" are

protected by the Constitution in all circumstances against acts of United States officials abroad. Rather, it asks only whether, when the United States prosecutes a foreign national in custody in this country for violations of our criminal laws, it must obey the same Fourth Amendment restrictions and safeguards that indisputably attach when the defendant is a citizen.

Amici maintain that at a minimum the Fourth Amendment attaches where, as here, the United States affirmatively places an individual in its custody in the United States for the purpose of imposing criminal punishment for violation of federal laws, and then conducts the search itself. The fact that the individual facing prosecution is a foreign national, and that the search in question was conducted beyond our borders, does not

immunize the government from this constitutional restriction.

These principles are supported by the text and purpose of the Fourth Amendment, which was designed primarily to restrict the government's ability to obtain evidence from a criminal defendant for use in his prosecution. This Court's precedents establish that aliens living in the United States are protected by the Fourth Amendment just as are citizens. And the fact that United States officials conducted the search abroad does not negate Fourth Amendment protection; the critical factor is not the locus of the search, but the fact that United States officials conducted it for the express purpose of obtaining evidence to use in Mr. Verdugo-Urquidez's prosecution here.

The lower courts, adhering to these principles, have uniformly held that the

Fourth Amendment applies when federal agents substantially participate in searches abroad and seek to introduce the fruits of their searches in domestic prosecutions. This Court should affirm the "joint venture" test set forth by those courts, and applied by the court below.

Because the Fourth Amendment applies, a warrant was required for the search of Mr. Verdugo-Urquidez's personal home. The government's unsupported suggestion that the Court create an across-the-board exception to the warrant requirement for foreign searches should be rejected. Imposition of the warrant requirement for foreign searches serves the same salutary purpose of interposing a judicial officer's objective judgment as it does for domestic searches. If the government can show "exigent circumstances" in a

particular case, the warrant requirement can and should be excused, but the government has shown no such circumstances here.

The Court should heed James Madison's warning to Thomas Jefferson: "perhaps it is a universal truth that the loss of liberty at home is to be charged to provisions against danger, real or pretended, from abroad."[1] Nothing about this search would justify excusing the federal agents involved from traditional Fourth Amendment scrutiny.

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[1]Letter from J. Madison to T. Jefferson, May 13, 1798, quoted in A. Schlesinger, The Imperial Presidency ix (1973).

ARGUMENT

I. AN ALIEN BROUGHT TO THE UNITED STATES FOR A CRIMINAL TRIAL IS PROTECTED BY THE FOURTH AMENDMENT WITH RESPECT TO A UNITED STATES GOVERNMENT OFFICIAL'S SEARCH OF HIS RESIDENCE ABROAD

Petitioner concedes that "[t]he United States is entirely a creature of the Constitution," and "can only act in accordance with all the limitations imposed by the Constitution," even when it operates abroad. Pet. Br. 11-12 (quoting Pet. App. 7a).

Amici maintain that this proposition and the text and purpose of the Fourth Amendment establish a clear rule: when United States officials conduct a search of the residence of an alien in custody here for the purpose of discovering evidence for his federal prosecution, they are restricted by the Fourth Amendment wherever the search takes place.

The government suggests on the contrary

that it should be free to conduct warrantless searches without probable cause whenever the individual being prosecuted is a foreign national and his residence lies beyond our borders. It reaches this result by applying a flexible case-by-case approach, under which courts should balance the nature of the right, the place in which the violation occurs, and the relationship of the individual claimant to the United States community. This subjective "global substantive due process" approach lacks any support in precedent,[2] and sets forth criteria which are irrelevant to the constitutional

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[2]While the government purports to rely on Justice Harlan's concurrence in Reid v. Covert, 354 U.S. 1, 65 (1957), that concurrence does not set forth or apply the test that the government proposes. Moreover, a majority of the Court rejected Justice Harlan's approach and adopted the Reid plurality approach in Kinsella v. United States ex rel. Singleton, 361 U.S. 234 (1960). See Section I.C. infra.

inquiry.

A. The Text and Purpose of the Fourth Amendment Support Its Application to All Persons Whom the United States Attempts to Prosecute

The Fourth Amendment guarantees "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const., Amendment IV. Unlike other constitutional provisions, the Fourth Amendment's protections apply to all "people" or "persons" and are not limited to citizens. Compare U.S. Const., Amendment IV with U.S. Const. Art. IV, §2; Amends. XV, XIX, XXIV, XXVI. Nor are its protections geographically limited to searches conducted in the United States. By contrast, other constitutional provisions specifically set forth their geographic limitations. E.g., U.S. Const., Art. I, §8 ("...all Duties,

Imposts and Excises shall be uniform throughout the United States.")[3] If the Framers intended the protections of the Fourth Amendment to be as limited as the government proposes, they could have so stated. They did not.

The fact that the Fourth Amendment protects "the people" rather than "persons" has never been held to bear any constitutional significance. While the dissent below and the United States in its

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[3]See also, U.S. Const., Art. I, § 8 [4] ("to establish...uniform laws on the subject of Bankruptcies throughout the United States"); Art. I, § 8 [3] ("To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes); Art. I, § 8 [10] ("To define and punish Piracies and Felonies committed on the high seas..."); Art. I, § 8 [17] ("To exercise exclusive Legislation" over the District of Columbia "...and to exercise like Authority over all Places purchased...in which the Same shall be."); Art. IV, § 2 [2] ("...to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States).

brief both appear to contend that this phrase was intended to limit Fourth Amendment guarantees to citizens, Verdugo-Urquidez, 856 F.2d at 1231; Pet. Br. 24-26, they point to nothing in the language or the history of the Fourth Amendment to support this proposition. Moreover, that contention cannot be squared with the undisputed proposition that the Fourth Amendment protects even illegal aliens living here. See Section I.B infra.[4]

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[4]The United States' emphasis on the significance of "the people" as opposed to "persons" is undermined by the fact that the First Amendment also refers only to "the people." Yet this Court has unambiguously stated that "freedom of speech is accorded aliens residing in this country." Bridges v. Wixon, 326 U.S. 135 148 (1945).

The most likely explanation for the use of "the people" in the Fourth Amendment, in the absence of any historical support explaining some difference in intended meaning, is that it was done simply to avoid the awkward rhetorical redundancy that would have been caused if "persons" were used. The amendment would have read, "The right of persons to be secure in

The purpose of the Fourth Amendment also supports its application, at a minimum, to all people whom the United States has subjected to criminal prosecution. Fourth Amendment jurisprudence makes clear that the core of the constitutional guarantee is directed at those searches and seizures conducted, as here, to obtain evidence for a criminal prosecution. As early as 1886, the Court explained the intimate connection between the protection against unreasonable searches and seizures and a fair criminal trial:

> [the Fourth and Fifth Amendments] apply to all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of life.... any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods, is within the condemnation [of those

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their persons..."

Amendments].

Boyd v. United States, 116 U.S. 616, 630 (1886) (emphasis added).

Similarly, in applying the exclusionary rule, the Court has stated that "the need for deterrence and hence the rationale for excluding the evidence are strongest where the Government's unlawful conduct would result in imposition of a criminal sanction on the victim of the search." United States v. Calandra, 414 U.S. 338, 347-48 (1974)(emphasis added).[5]

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[5]The Calandra decision demonstrates the close interconnection between Fourth Amendment rights and the claimant's subjection to criminal prosecution. In Calandra, the Court held that the Fourth Amendment did not permit an unindicted witness to refuse to answer questions before a grand jury based on evidence obtained from an unlawful search. The Court specifically distinguished its prior decision in Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920), which held that the Fourth Amendment does guarantee indicted persons indicted the right not to respond to a subpoena duces tecum based upon information obtained from an unlawful search. The reason Fourth

These cases demonstrate that the Fourth Amendment was designed in large part as a limitation on the government's ability to obtain evidence from a defendant for his criminal prosecution. In order to further this purpose, therefore, the protections of the Fourth Amendment must extend to all persons that the United States subjects to prosecution for violations of its criminal laws, at least with respect to searches in which United States agents participate for the purpose of obtaining evidence for the

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Amendment guarantees attached in Silverthorne Lumber Co., the Court explained, was that the claimants had been indicted, and the government's interest in obtaining the documents was "founded on a belief that they might be useful in the criminal prosecution already authorized by the grand jury." Calandra, 414 U.S. at 352 n.8. The same considerations mandate application of the Fourth Amendment in this case, for Mr. Verdugo-Urquidez was indicted when the search took place, and the government conducted the search in order to obtain information useful in its criminal prosecution of him.

prosecution.

The lower courts have uniformly recognized these principles, and have applied the Fourth Amendment and other constitutional restrictions to federal officials' actions against foreign nationals abroad when the government seeks to prosecute the foreign nationals in United States courts. In United States v. Toscanino, 500 F.2d 267 (2d Cir. 1974), for example, the court applied Fourth Amendment requirements to foreign wiretapping in the context of a federal criminal prosecution of a foreign national. As the court explained, "[n]o sound basis is offered in support of a different rule with respect to aliens who are the victims of unconstitutional action abroad, at least where the government seeks to exploit the fruits of its unlawful conduct in a criminal proceeding

against the alien in the United States." 500 F.2d at 280; see Note, The Extraterritorial Application of the Constitution -- Unalienable Rights?, 72 Va. L. Rev. 649, 668-69 (1986).

B. The Fact That Mr. Verdugo-Urquidez is A Foreign National Does Not Deprive Him Of the Protections of the Fourth Amendment.

The government concedes here, as it has before, that even illegal aliens in the United States are protected by the Fourth Amendment "with respect to searches and seizures conducted in this country." Pet. Br. 24 n.15; INS v. Lopez-Mendoza, 468 U.S. 1032, 1050, (1984); id. at 1051 (Brennan, J., dissenting); Almeida-Sanchez v. United States, 413 U.S. 266 (1973); Au Yi Lau v. I.N.S., 445 F.2d 217, 223 (D.C. Cir.), cert. denied, 404 U.S. 864 (1971); see Verdugo-Urquidez, 856 F.2d at 1223 (quoting Brief for United States in Lopez-

Mendoza). Certainly, Mr. Verdugo-Urquidez, who is lawfully living here, albeit against his will, has at least as much right to the Fourth Amendment's protections as an alien who is here illegally.

At least since 1886, this Court has repeatedly recognized that aliens in this country are protected by those provisions of the Constitution not expressly limited to citizens, regardless of whether the aliens are here legally or illegally. Plyler v. Doe, 457 U.S. 202, 211-12 (1982) (illegal aliens protected by equal protection clause); Kwong Hai Chew v. Colding, 344 U.S. 590, 596 (1953) (resident alien is "person" within the protection of the Fifth Amendment); Bridges v. Wixon, 326 U.S. at 148 (aliens residing here protected by First Amendment); Wong Wing v. United States,

163 U.S. 228, 238 (1896) ("all persons within the territory of the United States are entitled to the protection guaranteed by [the fifth and sixth] amendments"); Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886) ("The Fourteenth Amendment ... is not confined to the protection of citizens... [Its] provisions are universal in their application, to all persons within the territorial jurisdiction."); see also Verdugo-Urquidez, 856 F.2d at 1222 (and cases cited therein).[6]

These cases squarely refute the government's argument that the Constitution was only intended to protect

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[6]Even if there were a basis for calibrating rights to an alien's status, surely an alien whom our government has coerced into living here should be at least as fully protected by the Constitution as an alien who chooses to live here.

parties to the social compact.[7] Pet. Br. 22-23. However the social compact is defined, it seems unlikely that illegal aliens are parties to it. Yet this Court has repeatedly held that illegal aliens are entitled to constitutional protections. E.g., Plyler v. Doe, 457 U.S. at 211. As both John Madison and Justice Story noted, social compact theory simply does not answer the question whether those who designed the compact intended to protect not only their own rights, but also the rights of others who were not parties to the social compact.[8]

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[7]One obvious flaw with this argument is the difficulty in defining who are the parties to the "social compact" beyond the white men who ratified the Constitution. Neither the government nor the dissent below addresses this problem.

[8]In debates on the constitutionality of the Alien Act of 1798, John Madison stated:

Although aliens are not parties to the Constitution, it does not follow that the

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Constitution has vested in Congress an absolute power over them. The parties to the Constitution may have granted, or retained, or modified the power over aliens, without regard to that particular consideration ... it does not follow, because aliens are not parties to the Constitution, as citizens are parties to it, that whilst they actually conform to it, they have no right to its protection. Aliens are not more parties to the laws, than they are parties to the Constitution; yet, it will not be disputed, that as they owe, on one hand, a temporary obedience, they are entitled in return to their protection and advantage.

J. Madison, Madison's Report on the Virginia Resolutions, reprinted in 4 Elliot's Debates 546, 556 (2d ed. 1836)

Justice Story similarly rejected the social compact theory as a basis for denying persons the protection of the Bill of Rights:

It would, indeed, be an extraordinary use of language to consider a declaration of rights in a constitution, and especially of rights, which it proclaims to be "unalienable and indefeasible," to be a matter of contract, and resting on such a basis, rather than a solemn recognition and admission of those rights, arising from the law of nature, and the gift of Providence, and incapable of being transferred or surrendered.

1 J. Story, Commentaries on the Constitution of the United States §340, at

The only time the Court has relied upon social compact theory to limit constitutional rights was in Dred Scott v. Sanford, 60 U.S. (19 How.) 393, 404 (1856), in which the Court deprived slaves of constitutional protections. That ignominious history should not be repeated.

Thus, this Court's precedents regarding the constitutional rights of aliens in this country establish that Fourth Amendment protection does not turn on Mr. Verdugo-Urquidez's status as an alien or citizen.

C. The Fact That United States Agents Conducted the Search In A Foreign Country Does Not Immunize Them From Fourth Amendment Limitations

If the search at issue here had taken place in the United States, the government concedes that Fourth Amendment standards

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309 (Boston 1833) (emphasis in original).

would have applied, notwithstanding the nature of the Fourth Amendment right or Mr. Verdugo-Urquidez's nationality. Pet. Br. 24 n.15. Thus, while the government sets forth a three-part "test" that includes reference to the claimant's nationality and the "nature of the [Fourth Amendment] right," the dispositive factor in the government's argument is the location of the search.

The location of a search does not, however, determine whether the Fourth Amendment applies. As the courts of appeals have uniformly held, where United States agents substantially participate in a search abroad for the purpose of obtaining evidence for a criminal prosecution in the United States, the Fourth Amendment applies to the federal agents' actions, whether the search takes place in San Diego, California, or over

the border in Mexicali, Mexico. See Section II, infra. The government's argument to the contrary would require a reversal of this uniform approach of the circuit courts.

The government's arguments for reversing these precedents and imposing a territorial limitation on Fourth Amendment rights are based solely upon long-rejected or inapposite precedent. The government first cites dicta to the effect that "as a general matter, '[n]either the Constitution nor the laws passed in pursuance of it have any force in foreign territory unless in respect of our own citizens.'" Pet. Br. 12 (quoting United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 318 (1936)).[9] But this dicta,

[9]The Curtiss-Wright case had nothing to do with the rights of aliens either at home or abroad.

at least in the broad sense in which the government reads it,[10] is manifestly false. The government admits as much when it concedes that our criminal laws do apply to foreign nationals in foreign lands. Pet. Br. 12 n.8 (and cases cited therein). But the government fails to explain why, in the course of enforcing our criminal laws against foreign nationals, United States officials should not reciprocally be limited by the restrictions the Constitution imposes on criminal law enforcement.

[10]As one commentator has explained, the Curtiss-Wright dicta is easily squared with the proposition that the Constitution limits United States government officials' actions abroad: "In applying the Constitution abroad, however, it is always a United States citizen -- a government official -- who is being controlled by the Constitution." Ragosta, Aliens Abroad: Principles for the Application of Constitutional Limitations to Federal Action, 17 N.Y.U. J. Int'l. L. & P. 287, 293-94 (1985).

The government next argues that for much of the Nation's history, "the common understanding was that the Constitution had no extraterritorial force at all." Pet. Br. 13. But whether or not this was the "common understanding" before the 20th century, it has been repudiated by modern-day Supreme Court precedent. The government relies on In re Ross, 140 U.S. 453 (1891), which held that the Constitution did not apply to a United States citizen's criminal trial conducted by United States officials abroad, because the Constitution "can have no operation in another country." Id. at 464. But Ross has since been overruled. In Reid v. Covert, 354 U.S. 1, and Kinsella v. United States ex rel. Singleton, 361 U.S. 234, the Court held that United States civilians are entitled to the constitutional protections of a grand jury

and a jury trial when tried in a foreign country by the United States.

The plurality in Reid held that the Constitution applies fully to the actions of United States officials against United States citizens abroad, and thereby rejected the "territoriality" notion reflected in Ross and Curtiss-Wright:[11]

> we reject the idea that when the United States acts against citizens abroad it can do so free of the Bill of Rights. The United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in

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[11] Reid, 354 U.S. at 12 ("The Ross approach that the Constitution has no applicability abroad has long since been directly repudiated by numerous cases"); id. at 56 (Frankfurter, J., concurring) ("Insofar as the [Ross] opinion expresses a view that the Constitution is not operative outside the United States ... it expressed a notion that has long since evaporated. Governmental action abroad is performed under both the authority and the restrictions of the Constitution."); id. at 67 (Harlan, J., concurring) (Court was mistaken in interpreting Ross broadly); see also Note, The Extraterritorial Application of the Constitution -- Unalienable Rights?, 72 Va. L. Rev. 649, 659-60 (1986).

accordance with all the limitations imposed by the Constitution.

Reid, 354 U.S. at 5-6. While the concurring opinions of Justices Harlan and Frankfurter advocated a case-by-case determination of which constitutional provisions apply in which situations, the majority rejected that approach three years later, and adopted the plurality's approach. Kinsella, 361 U.S. 234 (1960).[12]

In Reid and Kinsella, the Court expressly rejected many of the arguments that the government seeks to resurrect here. In addition to the broad argument

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[12]Reid upheld jury trial and grand jury rights for capital offenses only. In Kinsella, which involved non-capital offenses, the government argued that practical considerations and difficulties militated against application of those constitutional rights in non-capital cases abroad. The majority rejected that argument, finding no distinction in the Constitution between capital and non-capital trials. Kinsella, 361 U.S. at 242-43. Justices Harlan and Frankfurter were the lone dissenters.

that the Constitution simply does not apply abroad, the government maintained in Reid and Kinsella that application of the Constitution abroad would be inconvenient, and would impair relations between the United States and foreign countries. The Court rejected both arguments. Regarding the United States' relations with other countries, the Court stated quite simply that the government cannot operate contrary to the Constitution by entering into an agreement with a foreign country.

Reid, 354 U.S. at 16-17. As to inconvenience, the Court stated:

> The concept that the Bill of Rights and other constitutional protections against arbitrary government are inoperative when they become inconvenient or when expediency dictates otherwise is a very dangerous doctrine and if allowed to flourish would destroy the benefit of a written Constitution and undermine the basis of our government.

Reid, 354 U.S. at 14; see also INS v.

Chadha, 462 U.S. 919, 959 (1983) ("There is no support in the Constitution or decisions of this Court for the proposition that the cumbersomeness and delays often encountered in complying with explicit constitutional standards may be avoided, either by the Congress or by the President.")

Reid also rejected the only other line of authorities upon which the United States relies for its proposed territorial limitation, that concerning the scope of constitutional rights in United States-acquired territories.[13] The Court in Reid

[13]These are commonly referred to as the Insular Cases. See, e.g. Downes v. Bidwell, 182 U.S. 244 (1901); Dooley v. United States, 182 U.S. 222 (1901); Fourteen Diamond Rights v. United States, 183 U.S. 176 (1901); Armstrong v. United States, 182 U.S. 243 (1901); Huus v. New York and Porto Rico Steamship Company, 182 U.S. 392 (1901); Dooley v. United States, 183 U.S. 151 (1901); Dorr v. United States, 195 U.S. 138 (1904); Territory of Hawaii v. Mankichi, 190 U.S. 197 (1903); Balzac v. Porto Rico, 258 U.S. 298 (1922);

expressly restricted the reasoning in those cases to situations involving territories over which the United States exercised sovereign control. Reid, 354 U.S. at 14; id. at 50-53 (Frankfurter, J., concurring). There are two reasons for such a restriction.

First, the territorial cases do not concern constitutional rights vis-a-vis United States agents, but vis-a-vis the local territorial authorities. In Balzac v. Porto Rico, 258 U.S. 298 (1922), for example, the prosecuting authorities were Puerto Rican, and the trial took place in a local Puerto Rican court. The claim was not that the Constitution restricts United States officials, but that because of United States sovereignty over Puerto Rico, the local courts and local officials

Santiago v. Nogueras, 214 U.S. 260 (1909).

were required to afford the defendant a jury trial. Thus, "the Insular Cases do not apply when the United States is acting as prosecutor in its own court." United States v. Tiede, 86 F.R.D. 227, 249 (United States Court for Berlin 1979).

Second, the territorial cases involved construction of Congress's power, under Article IV, §3 of the Constitution, to regulate all "Territory ... belonging to the United States." That constitutional power has historically been viewed as plenary. The Court was reluctant to impose our constitutional values on a people who might have different customs where Congress in its plenary power chose not to do so. See Dorr v. United States, 195 U.S. at 148; see also Note, Inventive Statesmanship vs. the Territorial Clause: The Constitutionality of Agreements Limiting Territorial Powers, 60 Va. L.

Rev. 1041, 1046-47, 1052 (1974).

Where, however, United States officials take actions in a foreign country over which the United States does not exercise sovereign authority as a territory, constitutional rights do not have to be weighed against Congress's plenary power over the territories. Thus, while United States citizens are not constitutionally entitled to a jury trial when they are prosecuted by Puerto Rican authorities in the "unincorporated" territory of Puerto Rico, Balzac v. Puerto Rico, 258 U.S. 298, they are entitled to that constitutional right when United States authorities prosecute them in England or Japan. Reid, 354 U.S. 1. The government therefore has it precisely backwards when it contends that lesser rights should apply when United States officials operate in foreign nations than when territorial authorities

operate in "unincorporated" territories. Pet. Br. 20.

Significantly, the government does not argue that citizens are bereft of Fourth Amendment protection whenever United States agents search their homes abroad rather than here. That argument is foreclosed by Reid and its progeny. As one distinguished commentator has pointed out, "[s]ince Reid, no court has suggested that any constitutional provision is inapplicable because the challenged conduct occurred in a foreign country." Henkin, The Constitution As Compact And As Conscience: Individual Rights Abroad And At Our Gates, 27 Wm. & Mary L. Rev. 11, 23 (1985).

All of the government's arguments for geographically limiting Fourth Amendment rights, however, would apply equally to citizens. The long-rejected Ross decision

on the territorial limits of constitutional protections involved United States citizens. The Insular Cases doctrine applies equally to citizens and non-citizens. And the government's asserted concerns regarding threats to its law enforcement efforts abroad, and its ability to work with foreign authorities in those efforts, would apply equally to searches of United States citizens' homes abroad.[14]

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[14]The government's contention that the Court should abandon the Fourth Amendment when United States officials act abroad because the Court will otherwise have to undertake a particularized analysis of expectations of privacy in foreign countries, Pet. Br. 27-28, is a red herring. First, no such inquiry is necessary, for the expectation of privacy runs against U.S. officials, and is thus hinged on the same uniform federal standard that applies here. Courts do not vary Fourth Amendment protections based on whether the search took place in an Alaskan igloo or a Manhattan highrise. Nor need they do so abroad. In any event, the fact that particularized inquiries would be difficult, if they were required, would not justify evisceration of the

Since these reasons are insufficient to remove Fourth Amendment protections from a citizen facing criminal prosecution by the United States, they are also insufficient to eviscerate the same protections for a foreign national under criminal prosecution by the United States. "Once we subject foreign vessels or aliens to criminal prosecution, they are entitled to the equal protection of all our laws, including the Fourth Amendment." United States v. Cadena, 585 F.2d 1252, 1262 (5th Cir. 1978).

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right itself. Finally, even if it might be difficult to determine whether or not an expectation of privacy existed in certain cases, no such difficulty is presented by this case. It is axiomatic that a person has an expectation of privacy in his or her private home.

II. UNITED STATES OFFICIALS ARE RESTRICTED BY THE FOURTH AMENDMENT WHENEVER THEIR PARTICIPATION IN A SEARCH ABROAD RENDERS THE SEARCH A "JOINT VENTURE"

Consistent with the principles articulated above, the lower courts have uniformly held that the Fourth Amendment applies where "Federal agents so substantially participated in...raids so as to convert them into joint ventures between the United States and the foreign officials." Stonehill v. United States, 405 F.2d 738, 743 (9th Cir. 1968), cert. denied, 395 U.S. 960 (1969). This test, or a variant thereof, has been applied by the First, Second, Fifth, Seventh, Ninth and Eleventh Circuits to determine whether Fourth Amendment guarantees should apply to a search conducted abroad. See, e.g., United States v. Peterson, 812 F.2d 486, 490 (9th Cir. 1987) (Kennedy, J.); United States v. Rosenthal, 793 F.2d 1214 (11th

Cir. 1986) modified, 801 F.2d 378 (1980), cert. denied, 480 U.S. 919 (1987); United States v. Peternina-Vergara, 749 F.2d 993, 998 (2d Cir. 1984), cert. denied, 469 U.S. 1217 (1985); United States v. Hawkins, 661 F.2d 436, 455-56 (5th Cir. 1981); United States v. Rose, 570 F.2d 1358, 1362 (9th Cir. 1978); United States v. Jordan, 23 C.M.A. 525, 50 C.M.R. 665 (1975), on rehearing, 1 M.J. 145 (CMA 1975), 1 M.J. 334 (CMA 1976); United States v. Marzano, 537 F.2d 257, 270 (7th Cir. 1976), cert. denied, 429 U.S. 1038 (1977); United States v. Morrow, 537 F.2d 120, 139 (5th Cir. 1976); Birdsell v. United States, 346 F.2d 775 (5th Cir.), cert. denied, 382 U.S. 963 (1965); Best v. United States, 184 F.2d 131, 138 (1st Cir. 1950).

The principle that the Fourth Amendment restricts United States agents' conduct abroad applies to citizens and aliens

alike. United States v. Demanett, 629 F.2d 862, 866 (3d Cir. 1980), cert. denied, 450 U.S. 910 (1981); United States v. Cadena, 585 F.2d at 1262; United States v. Toscanino, 500 F.2d at 280.

Significantly, no court has adopted the proposal that the government advances here, namely that the Fourth Amendment simply does not apply to federal officials' activities abroad with respect to aliens living here. On the contrary, the premise of the "joint venture" approach is that the Fourth Amendment restricts United States agents in conducting searches abroad. At the same time, the "joint venture" approach recognizes that our Constitution does not restrain foreign sovereigns acting independently, and therefore a showing of "substantial participation" is required before constitutional scrutiny is

triggered. Stonehill v. United States, 405 F.2d 738 at 743; Brulay v. United States, 383 F.2d 345 at 348 (9th Cir.), cert. denied, 389 U.S. 986 (1967).[15]

In setting forth the joint venture doctrine, the Stonehill court drew upon the analysis this Court applied in evaluating joint searches by federal and state agents before the Fourth Amendment exclusionary rule was applied to the states in Elkins v. United States, 364 U.S. 206 (1960), and Mapp v. Ohio, 367 U.S. 643 (1961). Under that approach, when evidence was unlawfully seized by state police officers, the exclusionary rule applied in federal court if "the

[15]In cases where a search conducted independently by foreign officials "shocks the conscience," the evidence obtained may be excluded in spite of the absence of direct U.S. participation. Birdsell v. United States, 346 F.2d 775, 782 n. 10 (5th Cir. 1965).

search in substance and effect was a joint operation of the local and federal officers." Byars v. United States, 273 U.S. 28, 33 (1926); Lustig v. United States, 338 U.S. 74, 79 (1948) ("a search is a search by a Federal official if he had a hand in it,...not...if evidence secured by state authorities is turned over to federal officials on a silver platter.").[16]

Applying these standards, there is no

[16]See also, Gambino v. United States, 275 U.S. 310 (1927). In Gambino, liquor was seized solely by state officials and subsequently turned over to federal authorities. However, because possession of liquor was an offense only under federal law, and hence, the search and seizure was conducted solely for federal prosecution purposes, the exclusionary rule was invoked. 275 U.S. at 316. See generally Note, The Applicability of the Exclusionary Rule in Federal Court to Evidence Seized and Confessions Obtained in Foreign Countries, 16 Col. J. Transnational L. 495, 497 (1977); Kamisar, Wolf and Lustig Ten Years Later: Illegal State Evidence in State and Federal Courts, 43 Minn L. Rev. 1083 (1959).

question that federal agents participated in the search of Verdugo-Urquidez's home sufficiently to render it a "joint venture" or "joint operation." As the court of appeals noted, the search was instigated, planned, and carried out by DEA Agent Bowen for the sole purpose of obtaining evidence for the prosecution of Mr. Verdugo-Urquidez, who was already in custody and under indictment in the United States. Verdugo-Urquidez, 856 F.2d at 1216. At the time of the search, there existed no separate Mexican investigation.

Bowen was assisted at the scene of the search by officers of the Mexican Federal Judicial Police (MFJP), but those officers merely brought to Bowen documents they found, and he then decided whether to seize them. Id. at 1227. All the seized documents were placed within the DEA's custody. In short, Agent Bowen directed

and conducted the search at all times.

This level of federal involvement is far more extensive than the involvement of federal officials in any of the cases that have found a "joint venture" or "joint operation" to exist under the Stonehill or Lustig-Byars standard. See United States v. Peterson, 812 F.2d 486, 490 (9th Cir. 1987) (Fourth Amendment applied where DEA agents' role in joint search and seizure was not "subordinate to the role of Philippine authorities"); United States v. Emery, 591 F.2d 1266, 1267-68 (9th Cir. 1978) (Fourth Amendment applied where DEA agents alerted Mexican authorities of impending drug transaction in Mexico, coordinated surveillance, signaled to Mexican authorities to arrest defendant, and observed defendants' interrogation by Mexican authorities); see also Lustig v. United States, 338 U.S. 74 (1948) (Fourth

Amendment applied where local police searched defendant's hotel room and, upon finding counterfeiting evidence, summoned a federal officer to the scene to examine and seize the evidence); Byars v. United States, 273 U.S. 28 (1926) (Fourth Amendment applied where, upon state's invitation, federal agent participated in state's search of defendant's premises and subsequent seizure of evidence).

Federal agents initiated and directed this search for federal law enforcement purposes, and therefore federal constitutional standards apply.

III. THE FOURTH AMENDMENT REQUIRES SUPPRESSION OF THE EVIDENCE HERE

Once it is determined that Fourth Amendment standards apply to the search at issue here, the Court should apply the same substantive standards as apply to

domestic searches. Those standards demand that searches and seizures require probable cause, and must be conducted pursuant to a warrant from a judicial officer, unless "exigent circumstances" justify an exception to the warrant requirement. While searches abroad might present "exigent circumstances" in appropriate cases, the government points to no circumstances in this case that would excuse application of the warrant requirement.

A. Federal Officials Participating In Searches Abroad Are Subject To The Same Fourth Amendment Restrictions As In Domestic Searches

Amici have established above that where, as here, a federal official conducts a search abroad for the purpose of obtaining evidence to use in a criminal prosecution in this country, he is subject to Fourth Amendment restrictions. See

Section I, supra. Following this rationale, the lower courts have applied Fourth Amendment and other constitutional standards in foreign contexts in the same manner and to the same extent as they would apply in a domestic context. See, e.g., United States v. Demanett, 629 F.2d at 866-68; United States v. Cadena, 585 F.2d at 1261-64; United States v. Emery, 591 F.2d at 1268; United States v. Toscanino, 500 F.2d at 280; United States v. Tiede, 86 F.R.D. at 242-44.

In the face of these authorities, the government contends that a diminished Fourth Amendment standard, permitting warrantless searches wherever they are "reasonable," should always apply to foreign searches. Pet. Br. 31-40. Nothing about foreign searches per se justifies such an across-the-board diminution of Fourth Amendment

requirements. Not surprisingly, no court has applied such a standard.[17]

This is not to say that the fact that

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[17]Without citing to any authority, the Ninth Circuit, in United States v. Peterson, 812 F.2d at 490, appeared to suggest that once Fourth Amendment requirements attach, the court should look to the law of the foreign country to determine whether the search is reasonable under the Fourth Amendment. The court in Verdugo-Urquidez rejected that broad suggestion, and for good reason. 856 F.2d at 1228. When the Fourth Amendment restricts federal officials abroad, it is the Fourth Amendment's substantive standards, and not foreign law, which should give content to that restriction. To hold otherwise would reduce the Fourth Amendment to whatever standards foreign countries impose, and would render it effectively meaningless as an independent restriction on federal agents' actions.

Neither does it make sense to hinge the "good faith" exception on compliance with foreign law. If federal agents act in good faith reliance on constitutional standards, the good faith exception applies. United States v. Leon, 468 U.S. 897 (1984). While foreign law should certainly be complied with, the federal government's obligation toward those persons, like Mr. Verdugo-Urquidez, whom it seeks to prosecute is to obey federal constitutional requirements.

a search takes place abroad will not enter into the constitutional calculus in a given case. Just as in the domestic context, if the government is able to demonstrate in a specific case that "special needs, beyond the normal law enforcement, make the warrant ... requirement impracticable," then it need not obtain a warrant. Griffin v. Wisconsin, 107 S. Ct. 3164, 3167 (1987). The foreign context, like the high seas, may in many circumstances provide such exigent circumstances. See, e.g., United States v. Cadena, 585 F.2d at 1262-63. But certainly not all foreign searches present exigent circumstances, as this case itself dramatically illustrates. DEA Agent Bowen made several inquiries before leaving for Mexico to conduct the search; he could easily have applied for a warrant before his departure. Pet. Br. 37-39. In

short, the government is unable to explain why it would have been difficult or impracticable in this case for DEA Agent Bowen to seek a warrant prior to his search.[18]

B. The Court of Appeals Correctly Held That A Warrant Was Required For The Search And Seizure At Issue Here

The search at issue in this case was of Mr. Verdugo-Urquidez's private residence. There is no dispute that if the search had

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[18]The government argues that no magistrate would have authority to issue such a warrant under current statutes. Pet. Br. 37-38. But the government made no attempt even to obtain an order that probable cause existed, which would have served the purpose of interposing a neutral magistrate's judgment. In any event, the fact that the current statutory scheme does not provide for a warrant cannot justify removing constitutional requirements. If the Constitution requires a warrant, it is the government's obligation to provide a statutory mechanism. It is possible, however, that in this case the absence of such authority might be relevant to a "good faith" exception. The court of appeals did not consider this, which might be appropriate for remand.

taken place in the United States, it would have required a warrant. Warrants are virtually always required for the search of a private home. Steagald v. United States, 451 U.S. 204, 212 (1981); Mincey v. Arizona, 437 U.S. 385, 390 (1978); Camara v. Municipal Court of San Francisco, 387 U.S. 523, 528-29 (1967); Johnson v. United States, 333 U.S. 10 (1948). As this Court has clearly stated, "[e]xcept in certain carefully defined classes of cases, a search of private property without proper consent is unreasonable unless it has been authorized by a valid search warrant." Camara, 387 U.S. at 528-29.[19]

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[19]The government effectively concedes by its silence that none of the traditional exceptions to the warrant requirement apply here. The basic rationale for those exceptions is that "exigent circumstances" place either persons or evidence in danger of being harmed or destroyed should law enforcement officers have to take the time to secure

The government argues that the Court should now abandon its previous approach of carefully defined exceptions, and hold the warrant requirement inapplicable per se to all searches conducted abroad.[20] It asserts that requiring a warrant for a foreign search "'would do little to further the[] aims' of the Warrant Clause." Pet. 34. On the contrary, as the court of appeals correctly reasoned, a warrant in these circumstances would serve all the purposes of the Warrant Clause. 856 F.2d at 1229-30.

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a warrant. Here, there is no showing that the evidence was in any danger or that the circumstances precluded DEA Agent Bowen from obtaining a warrant before going to Mexico to conduct the search.

[20]It is unclear whether the government limits this argument to foreign nationals, or would include citizens as well. But none of its arguments for creating an across-the-board exception turn on Mr. Verdugo-Urquidez's status as a foreign national. Pet. Br. 31-42.

The warrant requirement is primarily intended to position an objective judicial magistrate between a potentially overzealous police officer and the object of the intended search. Coolidge v. New Hampshire, 403 U.S. 443, 449 (1971). A warrant is also designed to define the scope of the search, and thereby ensure that the federal agents involved abide by Fourth Amendment restrictions. Marron v. United States, 275 U.S. 192, 196 (1927). These purposes would be no less furthered in the foreign than the domestic context.

The government argues that a warrant would not serve any purpose because it would not limit the foreign officials' search. In a case such as this, however, where the search is conducted solely for the purpose of obtaining evidence for enforcement of United States law, foreign officials would have no interest in going

beyond the dictates set forth in the warrant.[21] Moreover, the individual's Fourth Amendment right runs against United States officials and their agents, and the fact that foreign officials are not similarly bound does not legitimize federal misconduct. If this reasoning were sufficient to eviscerate the warrant requirement, this Court's pre-Mapp holdings requiring warrants when federal officials participated in state searches would have been erroneous. See Lustig v. United States, 338 U.S. 74 (1948); Byars

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[21]The government cites no authority whatsoever for the proposition that foreign officials generally "'decide the scope of and reasonableness of any proposed search,'" Pet. Br. 36 (quoting Pet. App. 79a (Wallace, J., dissenting)). In this case, for example, it is undisputed that DEA Agent Bowen decided the scope of the search. If the agents of both countries are acting in conformity with the respective legal requirements imposed upon them by their nation's laws, they will presumably jointly determine the scope of the search.

v. United States, 273 U.S. 28 (1926).

The government maintains that a warrant should not be required because it would not be sufficient to authorize the search as cooperation from foreign authorities would still be required. Pet. Br. 35. But the fact that an international search also requires the consent of another sovereign does not undermine the value of requiring our officials to abide by our constitutional requirements. It is well established that executive officials cannot ignore constitutional requirements in entering into an agreement with a foreign nation. Reid v. Covert, 354 U.S. at 16-17.[22]

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[22]While it is no doubt true that "it would be an affront to a foreign country's sovereignty if the DEA presented an American warrant and suggested that it gave the American agents all the authority they needed to search a foreign residence," Verdugo-Urquidez, 856 F.2d at 1230 (emphasis added), the solution is not to excuse the constitutional requirement,

In a similar vein, the government argues that because foreign cooperation is required in foreign searches, close scrutiny by officials of both countries is guaranteed and therefore a warrant is superfluous. Again, this case illustrates the fallacy of the government's assumption. The record indicates that "[d]espite [Agent Bowen's] inexperience with the use of ...foreign seized evidence in a United States prosecution, Bowen did not discuss the searches with anyone prior to making his decisions. Bowen alone made the decision to conduct the searches."

Pet. Br. 35, but to ensure that United States agents also seek foreign permission for searches authorized by a United States magistrate. The United States warrant would simply render the search permissible under United States law; it would not suggest that foreign law need not also be complied with.

Verdugo-Urquidez, 856 F.2d at 226.[23]

Finally, requiring a warrant in this case will not present undue hardships for law enforcement officers in future investigations. It will simply demand that, in situations not justifying an exception to the warrant requirement, the law enforcement officer pause long enough to obtain a warrant from a United States magistrate before searching an individual's home.

Obtaining a warrant does not necessarily require the officer to be present to the United States. Some courts have held that a warrant obtained via teletype or telephone, for example, is

[23]In any event, as this case also demonstrates, the foreign officials who cooperate in foreign searches are likely to be law enforcement officers, who may suffer from the same overzealousness that led to the warrant requirement in the first place. Coolidge v. New Hampshire, 403 U.S. at 449.

legitimate. See, e.g., United States v. Loalza-Vasquez, 735 F.2d 153, 157-58 (5th Cir.1985) (teletype); United States v. Gonzalez, 776 F.2d 931, 935-37 (11th Cir.1985) (telephone). Here, moreover, DEA Agent Bowen left for Mexico from California to search Verdugo-Urquidez's homes, and the government points to no "hardship" that he would have faced had he attempted to secure a search warrant from a United States magistrate.

Imposition of the warrant requirement here will not impinge upon the government's ability to gather foreign intelligence. This case involves only a traditional criminal investigation, not foreign intelligence-gathering. As the government itself points out, the courts of appeals have generally recognized exceptions to the Warrant Clause for foreign intelligence searches. Pet. Br.

41.

There is no justification for categorically waiving the warrant requirement for all foreign searches. If a particular foreign search poses "exigent circumstances" that fall within this Court's "carefully defined classes" of exceptions, Camara, 387 U.S. at 528-29, the warrant requirement can and should be excused. But as this case shows, by no means do all foreign searches pose such difficulties. The court of appeals therefore correctly held the warrant requirement applicable in this case.

CONCLUSION

For all of the above reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

PAUL L. HOFFMAN
JOHN W. HEILMAN
ACLU FOUNDATION OF SOUTHERN CALIFORNIA

DAVID D. COLE*
CENTER FOR CONSTITUTIONAL RIGHTS

JOHN A. POWELL
NINA PILLARD
AMERICAN CIVIL LIBERTIES UNION

BETTY WHEELER
ACLU FOUNDATION OF SAN DIEGO AND IMPERIAL COUNTIES

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*Counsel of Record